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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1900.

No. 143.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

vs.

L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED,
DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 10, 1899.

(17,533.)

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CONTENTS.

IN THE SUPERIOR COURT.

PLEADINGS.

COMPLAINT of Ebenezer Wormouth 1
ANSWER Jacob Gardner and Peter Gardner 4
ORDER allowing Supplemental Answer and Cross-Complaint .. 9
SUPPLEMENTAL ANSWER Jacob Gardner and Peter Gardner 10
CROSS-COMPLAINT Jacob Gardner 18
ANSWER TO CROSS-COMPLAINT of Ebenezer Wormouth... 25

JUDGMENT PAPERS.

FINDINGS OF FACT and Conclusions of Law 31
Findings on Equitable Issues..... 31
Conclusions of Law on Equitable Issues 36
Findings on Legal Issues (also 36) 155
Conclusions of Law on Legal Issues (also 38) 155
Instructions to Jury (also 38)..... 156
VERDICT 39
JUDGMENT 39

BILL OF EXCEPTIONS—PART I. (Equitable Issues) 43
JACOB GARDNER'S Deraignment of Title 43-46
DISENO (Spanish Map) 46
TRANSCRIPT OF TESTIMONY AND PROCEEDINGS G. L. DEPT. 46-118
REED PATENT 118
DECISION Commissioner General Land Office 121
DECISION Secretary of the Interior 126
TESTIMONY E. Wormouth 132

BILL OF EXCEPTIONS—PART II. (Legal Issues.)
STIPULATION (that Court decide Legal Issues) 137
E. WORMOUTH—Testimony 138
GRANT OF JURIDICAL POSSESSION (Mexican 145
STIPULATION (that documentary evidence on equitable issues be in evidence includes all Part I. printed, except oral testimony of E. Wormouth at page 132) 146
PETER GARDNER—Testimony..... 147
JACOB GARDNER—Testimony 151

PAPERS AFTER JUDGMENT.
NOTICE OF INTENTION to move for new trial..... 157
ORDER DENYING MOTION for new trial 167
NOTICE OF APPEAL 167
CERTIFICATE 168

IN STATE SUPREME COURT.

OPINION AND JUDGMENT 169

PROCEEDINGS ON WRIT OF ERROR.
PETITION FOR WRIT OF ERROR 172
ORDER ALLOWING WRIT OF ERROR 173
ASSIGNMENT OF ERRORS 174
BOND 200

IN UNITED STATES SUPREME COURT.

WRIT OF ERROR 201

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along said road about 10 chains to a fence; thence southwe

TRANSCRIPT ON APPEAL.

In the Supreme Court of the State of California.

1 Appeal from the Superior Court of the County of Marin, State of California.

[Title of Court and Cause.]

COMPLAINT.

Ebenezer Wormouth, plaintiff, complains of Peter Gardner and Jacob Gardner, defendants, and for cause of action avers:

I. That on the 1st day of February, A. D. 1891, the plaintiff was, and for a long time prior thereto had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit: Beginning at a post marked "C M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of section 28, and lot 3 of section 29, township 1 north of range No. 6 west, M. D. M., containing 46 acres and 26 hundredths. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

II. That on, to wit, the said 1st day of February, A. D. 1891, and while this plaintiff was so possessed and entitled to the possession of said land and premises, the said de-

2 fendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except that portion thereof bounded and described as follows, to wit: Beginning at a post marked "C .M. P. 180"; running thence due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwest-

erly along said fence to the said creek; thence descending the said creek to the point of beginning), and ever since have wrongfully and unlawfully withheld and still withhold the possession thereof from this plaintiff, to his damage in the sum of five hundred dollars ($500.00).

III. That the reasonable monthly value of the rents and profits of said land and premises is about Fifty Dollars per month, and that by reason of the unlawful withholding of said land and premises by defendants as aforesaid, plaintiff has been deprived, and by the continuance thereof will be deprived of the use and occupation of the same to his loss and damage in the sum of Fifty Dollars per month.

Second.

And for another, further and separate cause of action, and for the purposes of equitable relief, plaintiff avers and shows:

IV. That on the 1st day of February, A. D. 1891, the plaintiff was, and for a long time prior thereto had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to possession of that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit: Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of section 28, and lot 3 of section 29, township No. 1 north of range No. 6, M. D. M., containing 46 acres and 26 hundredths. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

3

That on, to wit, the said 1st day of February, A. D. 1891, and while this plaintiff was so possessed and entitled to the possession of said land and premises, the said defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except that portion thereof bounded and described as follows, to wit: Beginning at the post marked "C. M. P. 180"; thence running due north 2.45 chains to post marked "C. M. P. 181"; thence north 9 degrees east to a road known

as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwesterly along said fence to the said creek; thence descending said creek to the point of beginning), and ever since have wrongfully and unlawfully withheld, and still withhold the possession thereof from this plaintiff, to his damage in the sum of five hundred dollars, ($500.)

That the value of the rents and profits of the said land and premises while this plaintiff has been so excluded therefrom is the sum of fifteen hundred dollars, ($1500.)

During the time that defendants have excluded the plaintiff from said land and premises the said defendants have assumed the right to lease, and have let various parties into the possession of portions of said land and have been exacting from and receiving from such parties large sums of money claimed by said defendants as rental of the portions of land severally occupied by them, such sums amounting in all, as plaintiff is informed and believes, to at least fourteen hundred and fifty dollars, which should have been paid to the plaintiff; and that said defendants are continuing to collect from various parties now in such occupancy large sums of money claimed by said defendants under such unlawful pre-
4 tense, and threaten to continue to do so; that said parties are numerous, are unknown to the plaintiff, and are frequently changing; that said defendant Peter Gardner is insolvent; that said defendants are conspiring together to defraud this plaintiff out of the rents and profits of said land, and to that end are endeavoring to mislead this plaintiff as to which of said defendants is receiving said sums of money, and plaintiff does not know and cannot ascertain the facts in relation thereto, so that it is impossible for this plaintiff to obtain adequate relief in an action at law; that defendants have cut and carried away a large quantity of valuable timber growing upon said land, and threaten to and will, unless restrained by this Honorable Court, continue to cut and carry away valuable timber therefrom; that there is upon said land so unlawfully occupied by the defendants a building of great value, the property of this plaintiff, which said building this plaintiff believes and therefore charges that the said defendants design and intend to either destroy or remove from said land, to the great damage of plaintiff.

And plaintiff avers that the acts hereinbefore complained of are continuous and that their continuance during the litigation of this action, and the cutting and carrying away timber

from said land, and the destruction or removal of said or any building from said land, or either the continuance of said acts or said cutting of timber or said destruction or removal, would produce great injury to the plaintiff, for which he is remediless at law.

Wherefore plaintiff prays judgment for the restitution of said land and premises, for the sum of five hundred dollars damages for the withholding thereof, and for damages estimated at the rate of Fifty Dollars per month, the value of the rents and profits of said land and premises, from the 1st day of February, 1891, until the day of the Judgment to be entered herein, together with costs of suit; that until the further order of this Court the said defendants and each of them, their and each of their servants, agents, attorneys, employees and all persons acting under the control, authority or direction of them, or either of them, or claiming or to claim by, through or under them, or either of them, be enjoined and commanded to absolutely refrain from and desist from leasing to or letting any person or person into possession of any portion of said land and premises, and from receiving from any person or persons any sum of money whatever in consideration of the occupancy of any portion of said land and premises; and from cutting or interfering with any timber growing upon said land; and from destroying or removing from said land any building or structure whatever, and from interfering in any manner with said land and premises, or any portion thereof; and for such other or further relief as may be just and equitable.

TAYLOR & CRAIG,
Attorneys for Plaintiff.

[Duly verified.] [Duly filed.]

ANSWER.

I.

Now come the defendants, Peter Gardner and Jacob Gardner, and for answer to the first count of the Complaint on file in the above entitled action.

1st. Deny that on the 1st day of February, 1891, or any other time, the plaintiff was or for a long time or any time prior thereto, had been the owner of, or in the possession of, or entitled to the possession of, or from thence hitherto, or from any period of time or ever, has been the owner of or entitled

to the possession of the land described in said Complaint or any part thereof, or any of the tenements, hereditaments, or appurtenances thereunto belonging, or in anywise appertaining, except that plaintiff was on said day, and since that time has been in the possession of so much of the said land described in said Complaint, as is described as follows:

"A." Beginning at a post marked "C. M. P. 180," running thence due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the
6 said creek, thence descending the said creek to the point of beginning.

"B." Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of the said Blythedale road, running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from said line of said rancho, thence along said fence north 8 degrees 10 minutes west 514 5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle south 8 degrees 30 minutes west 277 5-10 feet, south 16 degrees 55 minutes west 143 7-10 feet, south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.

2nd. And defendants deny that on the 1st day of February, 1891, or while the plaintiff was possessed or entitled to the possession of said land or premises or any part thereof, except the said portion hereinbefore described, the defendants without right or title, or wrongfully, or unlawfully, or otherwise, or at all, entered into or upon the said land, or ousted or ejected the plaintiff from the same, or any part thereof, or that they ever entered at all into or upon any part of said excepted parcels of said land, or that said defendants, or either of them, have ever since wrongfully, or unlawfully, withheld the possession of any of said land from the plaintiff, or that the defendants ever ousted or ejected the plaintiff from any part of said excepted parcels of said land, or that defendants or either of them, have ever wrongfully or unlawfully, or otherwise or at all, withheld, or still, or now withhold the possession or any part of said excepted parcels of land hereinbefore described, from the plaintiff, or that the plaintiff has ever

been damaged by any withholding by defendants of said land from him in the sum of $500.00 or any other sum of money, but, on the contrary, these defendants aver that the defendant, Jacob Gardner, and his predecessors in estate, were at the date of the commencement of this action, and for more than
7 forty years next prior thereto, had been and still are the owners of and in the open, actual, and adverse possession of all of the lands described in said Complaint, except so much thereof as is hereinbefore described, and that the defendant, Peter Gardner, has for more than two years last been upon the said premises under and in subordination to the said Jacob Gardner and his title.

3rd. Deny that the reasonable monthly value or any monthly value of the rents and profits of the lands and premises or the lands or premises described in the Complaint is or ever was about $50.00 per month or any value per month greater than $10.09 per month, or that by reason of the unlawful withholding or any withholding of said land and premises, or said land or premises, by defendants, or either of them, plaintiff has been deprived or by the continuance thereof will be deprived of the use and occupation of the same to his loss and damage in the sum of $50.00-100 per month or any sum of money greater than $10.00-100 per month.

II.

And defendants, for answer to the second count of said complaint.

1st. Deny that on the 1st day of February, 1891, or at any other time prior thereto, had been the owner of or in the possesion of, or entitled to the possession of, or from thence hitherto, or from any period of time, or ever, has been the owner of, or entitled to the possession of the land described in said Complaint, or any part thereof, or any of the tenements, hereditaments or appurtenances thereunto belonging, or in anywise appertaining, except that plaintiff was on said day, and since that time has been in the possession of so much of the said land described in said Complaint as is described as follows:

"A." Beginning at the post marked "C. M. P. 180," thence running due north 2.45 chains to post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the

said creek, thence descending said creek to the point of beginning.

"B." Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio, with the northerly line of said Blythedale road, running thence N. 9 deg. E. along said line of said Rancho to a fence which runs N. 8 deg. 10 min. W. from the said line of said Rancho, thence along said fence N. 8 deg. 10 min. W. 514 5-10 feet, N. 14 deg. 30 min. W. 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle S. 8 deg. 30 min. W. 277 5-10 feet, S. 16 deg. 55 min. W. 143 7-10 feet, S. 22 deg. 11 min. W. to the said northerly line of said Blythedale road; thence southeasterly along the said northerly line of said road to the place of beginning.

2nd. And defendants deny that on the 1st day of February, 1891, or while the plaintiff was possessed or entitled to the possession of said land or premises or any part thereof, except the said portions hereof hereinbefore described, the defendants without right, or title, wrongfully, or unlawfully, or otherwise or at all entered into or upon the said land, or ousted or ejected the plaintiff from the same, or any part thereof, or that they ever entered at all into or upon any part of said excepted parcels of said land or that said defendant or either of them, have ever since wrongfully or unlawfully withheld possession of any of said land from the plaintiff, or that the defendants ever ousted or ejected the plaintiff from any part of said excepted parcels of said land, or that defendants or either of them have ever, wrongfully, or unlawfully, or otherwise or at all, withheld or still or now withhold the possession of any part of said excepted parcels of land hereinbefore described from the plaintiff or that the plaintiff has ever been damaged by any withholding by defendants of said land from him, in the sum of $500.00 or any other sum of money, but on the contrary these defendants aver that the defendant, Jacob Gardner, and his predecessors in estate, were at the date of the commencement of this action, and for more than forty years next prior thereto, had been and still are
9 the owners of and in the open, actual and adverse possession of all of the lands described in said Complaint, except so much thereof as is hereinbefore described, and that the defendant, Peter Gardner, has for more than two years last past been upon said premises under and in subordination to the said Jacob Gardner and his title.

3rd. And defendants deny that the value of the rents and profits of said land and premises described in said Complaint, during the time it is alleged that the plaintiff has been excluded therefrom, is the sum of $1500.00 or any other sum greater than $100.00.

4th. Defendants deny that the sums received by them or either of them, as rents of the said land during the period during which it is alleged in said Complaint that the plaintiff was excluded therefrom by defendants, amount to the sum of $1450.00 or any greater sum than $550.00.

5th. And defendants deny that they are continuing to collect from various or any parties now in the occupancy of said land, large sums of money, or any sums of money claimed by defendants under any unlawful pretense, and they aver that the sums of money being collected by them are small sums which they have a right to collect and are rightfully collecting. And deny that the parties from whom defendants are collecting such moneys are numerous or unknown to the plaintiff.

6th. And defendants deny that they or either of them are conspiring together to defraud the plaintiff out of the rents or profits of said land, or to that end or otherwise or at all, are endeavoring to mislead the plaintiff as to which of said defendants is receiving said sums of money, or that plaintiff does not know or cannot ascertain the facts in relation thereto, or that it is impossible for plaintiff to obtain adequate relief in an action at law, and deny that defendants or either of them have cut or carried away a large quantity or any quantity of valuable timber, or any kind of timber growing upon said land described in said Complaint, or which ever grew thereon, or that they threaten to, or will unless restrained by this Court, continue to cut or carry away valuable timber or any timber therefrom, or that there is upon said land occupied by the defendants a building of great value, or any building which is the property of the plaintiff, and deny that the defendants design or intend, or ever designed or intended to destroy or remove from the land mentioned and described in said Complaint, the building mentioned in said Complaint.

7th. And defendants deny that the acts or any act complained of in the second count of plaintiff's Complaint are continuous, or that they were ever committed at all, and deny that the continuance of any act or acts complained of in said Complaint during the litigation of this action, or the cutting or carrying away of any timber from said land, or the destruc-

tion or removal of said or any building from said land, or either the continuance of said acts, or said cutting of timber, or said destruction or removal would produce great or any injury to the plaintiff, or for which he is remediless at law, and defendants most emphatically deny that they intend to cut or carry away any timber from said land, or to destroy or remove from said land any building thereon.

8th. And for a further and separate defense to both of the causes of action for damages alleged in plaintiff's Complaint:

The defendants allege that during the period during which said defendants have been in possession of the land described in said Complaint, except the said excepted portions of said land hereinbefore described, the defendants made and erected on the said lands outside of said excepted portions, permanent improvements, consisting of a house and fencing of the value of $2000.00, and that said defendants were at the time of the erection of said improvements, holding said lands under color of title adversely to the claim of the plaintiff in good faith.

Wherefore defendants pray Judgment that plaintiff take nothing by this action, and that defendants have and recover from plaintiff their costs, and that they have such other and further relief as may be just and equitable.

HEPBURN WILKINS,
Attorney for Defendants.

[Duly verified.] [Duly filed.]

[Title of Court and Cause.]

January 28, 1895.

ORDER ALLOWING SUPPLEMENTAL ANSWER AND CROSS-COMPLAINT.

The plaintiff's motion to set the above entitled cause
11 for trial, came on this day regularly to be heard: whereupon defendant's attorney moved for leave to file a supplemental answer and cross-Complaint setting up the matter set fort in the cross-Complaint filed by the defendants in case No. 1316 in the above entitled Court, and after hearing counset forth in the cross-Complaint filed by the defendants in case for plaintiff in opposition thereto.

It is ordered, that the hearing of the motion to set this cause for trial be continued until Monday, the fourth day of February, 1895, at ten and one-half o'clock A. M., and that defendants have until twelve o'clock M. of Friday, the first day

of February, 1895, within which to file and serve the supplemental pleadings above designated.

[Title of Court and Cause.]

SUPPLEMENTAL ANSWER.

Now come the defendants, Peter Gardner and Jacob Gardner, and by leave of the Court first had and obtained, file this, their additional and supplemental answer to the Complaint herein, and for further, separate, supplemental and additional answer to each of the causes of action set forth in said complaint allege:

1st. That on or about the 2nd day of October, 1834, Jose Figueroa, as the Governor of California, under the government of Mexico, granted to one Juan Reed a certain tract of land, situated in the State of California, and in what afterwards became the county of Marin, being the tract of land known as and called the Rancho Corte Madera del Presidio.

2d. That defendants aver on their information and belief that the said Rancho granted as aforesaid, included within its exterior limits the land hereinafter mentioned, which was conveyed by the deed hereinafter mentioned from T. B. Deffebach et al. to Julius C. McCeney, dated February 14th, 1871.

3rd. That in the year 1843, Juan Reed died intestate in the said State of California, leaving surviving him his four children, to wit: His son, John J. Reed, his daughter,
12 Maria Inez Reed, who afterwards intermarried with one Thomas B. Deffebach, and thereafter bore the name of Deffebach, his daughter, Hilarita Reed, also known as Hilaria Reed and as Hilaria M. Reed, and his son, Ricardo Reed, which children were the only heirs at law of said Juan Reed, and that the said Ricardo Reed died in the year 1853, intestate, and under twenty-one years of age, leaving the said other children of said Juan Reed, his only heirs at law.

4th. That on or about the 12th day of June, 1854, the Board of Land Commissioners for the State of California made and entered a judgment and order confirming the said grant. That thereafter an appeal was taken from the judgment or order aforesaid of the said Board of Land Commissioners, to the District Court of the United States in and for the District of California. That thereafter, on the 14th day of January, 1856, a judgment and decree was duly made and entered in the said District Court, whereby it was adjudged that the claim of the

appellees who were the said heirs of the said Juan Reed, was a good and valid claim, and that the said claim be and the same was thereby confirmed to the extent and quantity of one square league, being the same land described in the said grant, and of which possession was proved to have been long enjoyed, provided that the said quantity of one square league then confirmed be contained within the boundaries called for in the said grant, and the map to which the grant refers, and if there should be less than that quantity within said boundaries, then that the Court confirmed to the claimants that less quantity.

5th. That in the year 1858, a survey of the said Mexican grant was made by the United States Deputy Surveyor, R. C. Mathewson, generally known as the "Mathewson survey," and the defendants aver on their information and belief that the land described in the said deed from T. B. Deffebach et al. to Julius C. McCeney, was outside of the exterior boundaries of said Mathewson survey, and within the exterior boundaries of said Mexican grant. That the said Mathewson survey never became final, and that thereafter, in the year 1872, the said Mathewson survey was set aside by the authorities of
13 the United States, and a new survey ordered by said authorities.

6th. That defendants aver on their information and belief that thereafter, in the months of November and December, 1873, and June, 1874, a re-survey was made by the authorities of the United States of the lands embraced by the said Mexican grant, and that said last survey of said Mexican grant became the final survey and official survey thereof.

7th. That on the 25th day of February, 1885, a patent was issued by the United States to the said John J. Reed, Maria Inez Reed and Hilarita Reed, for the said Mexican grant of land as surveyed by the survey last mentioned, and that by the said last mentioned survey and the said patent, the land described in the said deed from said T. B. Deffebach et al. to said Julius C. McCeney was excluded.

8th. That on or about the 12th day of August, 1865, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach and T. B. Deffebach, her husband, made, executed and delivered for a valuable consideration to J. Clinton Bolton, a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in the said Mathewson survey.

9th. That on or about the 16th day of September, 1865, said

Bolton made, executed and delivered to R. Steinback all the undivided one-fourth part of all the said Mexican grant which was not included in said Mathewson survey.

10th. That on or about the 28th day of March, 1866, said R. Steinback made, executed and delivered to Emil Steinback a deed whereby he conveyed to Emil Steinback the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

11th. That on or about the 16th day of June, 1866, said Emil Steinback made, executed and delivered to Emil Grisar a deed whereby he conveyed to said Grisar the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

12th. That on the 19th day of June, 1866, the said
14 Emil Grisar made, execupted and delivered to Samuel R. Throckmorton, a deed, whereby he conveyed to said Throckmorton all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

13th. That on or about the 26th day of July, 1868, the said J. Clinton Bolton made, executed and delivered to T. B. Valentine a deed, whereby he conveyed to said Valentine all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

14th. That on or about the 11th day of May, 1869, John J. Reed made, executed and delivered to Hugh A. Boyle a deed, whereby he conveyed to said Boyle all the undivided one-sixth part of all the said Mexican grant which was not included in the said Mathewson survey.

15th. That on or about the 24th day of May, 1869, the said Hilarita Reed made, executed and delivered to said Hugh A. Boyle a deed, whereby she conveyed to the said Boyle all the undivided one-sixth part of the said Mexican grant which was not included in the said Mathewson survey.

16th. That on or about the 1st day of February, 1871, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall made, executed and delivered to Julius C. McCeney a deed, whereby they conveyed to said McCeney all that certain tract of land situated in the County of Marin, State of California, bounded and described as follows, to wit:

Beginning at a post marked "C. M. P. 181," distant 20 chs. north of corner sections 28, 29, 32 and 33, in township one north, range six west, Mount Diablo meridian, from which a

madrona tree four feet in diameter, marked "B. J. C. M. P. 181," bears S. 24 deg. east 87 links distant, said post is station 181 on R. C. Mathewson's survey of the Rancho "Corte Madera del Presidio," as approved by the United States Surveyor General of the State of California, September 19th, 1859; thence along the line of said Mathewson's survey, E. 6.38 chs. to station, a post in stone mound, from which an oak tree 22 inches in diameter, bears N. 17½ deg. W. 33 chs. and said madrona tree bears S. 82½ deg. W.; thence leaving said Mathewson's survey, N. 9 deg. W. 29.90 chs. to station; thence 70¾ deg. W. 10.70 chains to station post marked "A"; thence S. 73¾ deg. W. 16.65 chs. to station in center of the creek, known as the "Arroyo de Corte Madera del Presidio;" thence down the center of said creek with the meanders thereof according to William J. Lewis' survey of the Rancho Saucelito, approved October 2d, 1860, by the said Surveyor General, S. 39¾ deg. E. 1.50 chs. to station 11 of said Lewis' survey; thence S. 4.½ deg. E. 10.74 chs. to station 12 of said Lewis' survey; thence S. 17 deg. E.8.50 chs. to station 13 of said Lewis' survey; thence S. 35 deg. E. 10.30 chs. to station 14 of said Lewis' survey; thence S. 71.¼ deg. E. 10.78 chs. to station 15 of said Lewis' survey; thence N. 70.¾ deg. E. 3.90 chs. to station 16 of said Lewis' survey; thence S. 33.¾ deg. E. 0.40 chs. to station in center of said Arroyo, and on line between sections 28 and 29, township one north, range six west, 17.55 chs. north of corner sections 28, 29, 32 and 33; thence leaving said creek and survey, N. 2.45 chs. to the post marked "C. M. P. 181," the place of beginning. Containing 80.24-100 acres of land.

17th. That on or about the 19th day of January, 1875, the said Julius C. McCeney made, executed and delivered to Samuel R. Throckmorton a deed, whereby he conveyed to said Throckmorton all of the land described in said deed of February 1st, 1871, from Thos. B. Deffebach et al. to said Samuel R. Throckmorton.

18th. Defendants aver on their information and belief that each and all of the grantees named in the deeds aforesaid purchased the lands and interest therein which the said deeds purportd to convey in good faith and for a valuable consideration, and that the said grantees used, improved and continued in the actual possession of the said lands, including lot 3 in section 28 and lot 3 in section 29, in township one north, range six west, according to the United States Government surveys according to the lines of their original purchases, and that

said lands were so used and improved as tenants in
16 common by the said various grantees, until the 14th day of February, 1871, on which day the various tenants in common, except said Throckmorton, made the conveyance aforesaid to said Julius C. McCeney, and that said conveyance was made to said McCeney, in trust for said Throckmorton, and in order to segregate the interest of said Throckmorton in said lands and convey the same in severalty to said Throckmorton, and in pursuance of said trust, the said McCeney made, executed and delivered the said deed of January 19th, 1875, to said Throckmorton, and that ever since the said 1st day of February, 1871, up to the date of the deed to defendant, Jacob Gardner, hereinafter mentioned, the said Throckmorton and the executrix of his will after his death, used and improved, and continued in the actual possession of the land described in the said deed of February 1st, 1871, to the said McCeney, and the said deed of January 19th, 1875, to said Throckmorton, substantially according to the lines of the said deeds, and that the said Throckmorton, and all said other grantees at the dates of said several purchasers, believed in good faith that all of the lands conveyed by said deeds as aforesaid, were included within the said Mexican grant to the said Juan Reed, and that the said Throckmorton, in good faith, entertained such belief until the date of his death, and that the said Mexican grant aforesaid did purport to grant and convey all of the said lands described in the said deeds to the said McCeney and the said Throckmorton.

19th. That on or about the 19th day of January, 1875, the said Throckmorton, as a bona-fide purchaser from Mexican grantees, made an application to the register and receiver of the United States Land Office at San Francisco, under Sec. 7 of the Act of the Congress of the United States, entitled "An Act to quiet titles in California," approved July 23d, 1866, basing his application upon the facts hereinbefore set forth, and that the said Ebenezer Wormouth was a party defendant upon the said application of said Throckmorton in said land office, and claimed the said land as a pre-emptor, and contested said application.

20th. The defendants aver on their information and
17 belief, that evidence was introduced in the matter of the application and contest aforesaid, showing without conflict that all the facts hereinbefore set forth were true, and establishing all of said facts by competent evidence, but that, notwithstanding the said evidence which was given as afore-

said in said United States Land Office in San Francisco upon the said contest, and notwithstanding that there was no conflict in said evidence, and no evidence whatever on said contest which contradicted the said evidence or any part thereof, and that the said evidence was true, the register and receiver of the land office at San Francisco, on or about the 9th day of February, 1886, basing their decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced before them on said application as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, denied the application of said Throckmorton to purchase the said land, and that on appeal from the said decision to the commissioner of the General Land Office of the United States, on the proofs taken before the said register and receiver, the said commissioner, on or about the 18th day of June, 1890, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, affirmed the said decision of said register and receiver, and that on appeal from said decision of said commissioner, the Secretary of the Interior of the United States, on or about the 24th day of October, 1891, on the same proofs, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said lands, affirming the decision of the said commissioner, denying the application of said Throckmorton to purchase said land under said act.

21st. That thereafter, upon the return of the instructions of the superior officers on said appeals to the United
18 States Land Office at San Francisco, the register and receiver of the said land office, on or about the 20th day of July, 1892, notwithstanding the application of the said Thockmorton, and notwithstanding the fact that the said Throckmorton was entitled to purchase the said land under the said Act of Congress, did, contrary to aw, and basing their action on the erroneous construction of the law applicable to the case before them, and against the protest and objection of the representatives of the said Throckmorton, allow the said plaintiff, Wormouth, to make proof and payment for the said land described in said deed to said Throckmorton, and issued

to the said Wormouth a certificate of purchase for the said land as a commuted homestead entry.

22nd. That thereafter, on the 14th day of August, 1893, and in pursuance of the said certificate of purchase and the rulings aforesaid of said officers of the Land Department of the United States, a patent was issued by the President of the United States to the said plaintiff, Ebenezer Wormouth, purporting to convey to him the lands described in the said deed to said Throckmorton.

23d. That on or about the 28th day of May, 1883, the said Samuel R. Throckmorton died in the City and County of San Francisco, State of California, leaving a will by which he bequeathed to his daughter, Susanna M. Throckmorton, all his property and estate.

24th. That on-on about the 27th day of June, 1883, an order was duly given and made in and by the Superior Court of the City and County of San Francisco, State of California, whereby the said Susanna M. Throckmorton, who was named in said will as the executrix thereof, was duly appointed as such executrix, and whereby letters testamentary were duly ordered to be issued to her.

25th. That thereafter, on the 27th day of June, 1883, letters testamentary upon the estate of said decedent were duly issued to the said Susanna M. Throckmorton, who then was and up to the date of the distribution of the estate of said decedent continued to be, the duly appointed, qualified
19 and acting executrix of the will of said decedent.

26th. That on or about the 23rd day of September, 1889, an order and decree was duly given and made in and by said Superior Court of said City and County, whereby the whole estate, real and personal, of said decedent was distributed to the said Susanna M. Throckmorton.

27th. That on or about the 17th day of July, 1890, the said Susanna M. Throckmorton, made, executed and delivered to the defendant, Jacob Gardner, a deed, whereby she conveyed to the said defendant all those certain parcels of land situate, lying and being in the County of Marin, State of California, and described as follows, to wit:

Lot 3 of section 28 and lot 3 of section 29, township one north, range 6 east, Mt. Diablo base and meridian. Containing 43 acres of land, more or less. Being a part of the property conveyed by and described in said deed from Julius C. McCeney to Samuel R. Throckmorton.

28th. That on the said 17th day of July, 1890, defendant, Jacob Gardner, entered under the said last mentioned deed

into the possession, and has since hitherto remained in the possession of the land conveyed by and described in the said deed, except so much thereof as is described as follows, to wit:

Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chs. to a post marked "C. M. P. 181"; thence north 9 deg. east to a road known as the Blythedale road; thence northwesterly along said road about 10 chs. to a fence; thence southwesterly along said fence to a creek on the easterly boundary line of the Rancho Saucelito; thence descending the said creek to the point of beginning.

29th. That the defendant, Jacob Gardner, was always prevented by the plaintiff from entering into the possession of said excepted parcel.

30th. And defendant, Jacob Gardner, avers that he is the owner in equity of the said land described in the said deed from Susanna M. Throckmorton to him, and that the legal title to said land which is included in said patent from the United States to Ebenezer Wormouth, is held in trust by the said plaintiff, Wormouth, for the defendant, Jacob Gardner.

31st. That the defendant, Peter Gardner is, and was at the date of the commencement of this action, in possession of certain portions of the lands described in said complaint, as the tenant of the said defendant, Jacob Gardner.

Wherefore, defendants pray that plaintiff take nothing by this action, and that it be adjudged and decreed that the land described in the said deed from Susanna M. Throckmorton to the defendant, Jacob Gardner, and the title thereof conveyed by the patent from the United States to the plaintiff, issued on the 14th day of August, 1893, is held by the plaintiff in trust for the defendant, Jacob Gardner, and that the said plaintiff be commanded and required to execute, acknowledge and deliver to the defendant, Jacob Gardner, a deed conveying to said defendant all of the land described in the deed from said Susanna M. Throckmorton, and that defendants have such other relief as may be just and equitable, together with the costs of this action.

HEPBURN WILKINS,
Attorney for Defendants.

[Duly verified.] [Duly filed.]

CROSS COMPLAINT OF JACOB GARDNER.

[Title of Court and Cause.]

Now comes the defendant, Jacob Gardner, and by leave of the Court first had and obtained, files this his cross-complaint against the plaintiff in the above-entitled action, and for cross-complaint against the plaintiff alleges:

1st. That on or about the second day of October, 1834, Jose Figueroa, as the Governor of California, under the government of Mexico, granted to one Juan Reed a certain tract of land situated in the State of California, and in what afterwards became the County of Marin, being the tract of land known as and called the Rancho Corte Madera del Presidio.

2d. Defendant avers on his information and belief that the said Rancho granted as aforesaid included within its exterior limits the land hereinafter mentioned, which was conveyed by the deed hereinafter mentioned, from T. B. Deffebach et al. to Julius C. McCeney, dated February 14th, 1871.

3d. That in the year 1843 Juan Reed died died intestate in the said State of California, leaving surviving him four children, to wit: his son, John J. Reed, his daughter, Maria Inez Reed, who afterwards intermarried with one Thomas F. Deffebach, and thereafter bore the name of Deffebach; his daughter, Hilarita Reed, also known as Hilaria Reed and as Hilaria M. Reed, and his son, Ricardo Reed, which children were the only heirs-at-law of said Juan Reed, and that the said Ricardo Reed died in the year 1853, intestate, and under twenty-one years of age, leaving the said other children of said Juan Reed his only heirs-at-law.

4th. That on or about the 12th day of June, 1854, the Board of Land Commissioners for the State of California made and entered a judgment and order confirming said grant. That thereafter an appeal was taken from the judgment or order aforesaid of the said Board of Land Commissioners to the District Court of the United States in and for the District of California: That thereafter, on the 14th day of January, 1856, a judgment and decree was duly made and entered in the said District Court, whereby it was adjudged that the claim of the appellees who were the said heirs of said Juan Reed was a good and valid claim, and that the said claim be and the same was thereby confirmed to the extent and quantity of one square league, being the same land described in the said grant, and of which possession was proved to have been long enjoyed, provided that the said quantity of one square league

then confirmed be contained within the boundaries called for in the said grant, and the map to which the grant refers, and if there should be less than that quantity within said boundaries, then that the Court confirmed to the claimants that less quantity.

5th. That in the year 1858 a survey of the said Mexican grant was made by the United States Deputy Surveyor, R. C. Mathewson, generally known as the "Mathewson sur-
22 vey," and the defendant avers on his information and belief that the land described in the said deed from T. B. Deffebach et al. to Julius C. McCeney was outside of the exterior boundaries of Mathewson survey, and within the exterior boundaries of said Mexican grant. That the said Mathewson survey never became final, and that thereafter, in the year 1872, the said Mathewson survey was set aside by the authorities of United States, and a new survey ordered by said authorities.

6th. The defendant avers on his information and belief that thereafter, in the months of November and December, 1873, and June, 1874, a re-survey was made by the authorities of the United States of the lands embraced by the said Mexican grant, and that said last mentioned survey of said Mexican grant became the final survey and official survey thereof.

7th. That on or about the 25th day of February, 1885, a patent was issued by the United States to the said John J. Reed, Maria Inez Reed and Hilarita Reed for the said Mexican grant of land as surveyed by the survey last mentioned, and that by the said last mentioned survey and the said patent the land described in the said deed from said T. B. Deffebach et al. to said Julius C. McCeney was excluded.

8th. That on or about the 12th day of August, 1865, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach and T. B. Deffebach, her husband, made, executed and delivered for a valuable consideration to J. Clinton Bolton, a deed, whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in the said Mathewson survey.

9th. That on or about the 16th day of September, 1865, said Bolton made, executed and delivered to R. Steinback
23 all the undivided one-fourth part of all the said Mexican grant which was not included in said Mathewson survey.

10th. That on or about the 28th day of March, 1866, said R. Steinback made, executed and delivered to Emil Steinback

a deed, whereby he conveyed to said Emil Steinback the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

11th. That on or about the 16th day of June, 1866, said Emil Steinbach made, executed and delivered to Emil Grisar a deed whereby he conveyed to said Grisar the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

12th. That on the 19th day of June, 1866, the said Emil Grisar made, executed and delivered to Samuel R. Throckmorton, a deed, whereby he conveyed to said Throckmorton all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

13th. That on or about the 26th day of July, 1868, the said J. Clinton Bolton made, executed and delivered to T. B. Valentine, a deed, whereby he conveyed to said Valentine all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

14th. That on or about the 14th day of May, 1869, John J. Reed made, executed and delivered to Hugh A. Boyle a deed, whereby he conveyed to said Boyle all the undivided one-sixth part of all the said Mexican grant which was not included in the said Mathewson survey.

15th. That on or about the 24th day of May, 1869, the said Hilarita Reed made, executed and delivered to said Hugh A. Boyle a deed, whereby she conveyed to the said Boyle all the undivided one-sixth part of the said Mexican grant which was not included in the said Mathewson survey.

16th. That on or about the 1st day of February, 1871, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall made, executed and deliv-
24 ered to Julius C. McCeney a deed, whereby they conveyed to said McCeney all that certain tract of land situated in the County of Marin, State of California, bounded and described as follows, to wit:

Beginning at a post marked "C. M. P. 181," distant 20 chains north of corner sections 28, 29, 32 and 33 in township one north, range six west, Mount Diablo meridian, from which a madrona tree four feet in diameter, marked "B. J. C. M. P. 181," bears S. 24 deg. east 87 links distant; said post is station 181 on R. C. Mathewson's survey of the Rancho "Corte Madera del Presidio," as approved by the United States Surveyor General of the State of California, September 19th, 1859; thence along the line of said Mathewson's survey E. 6.38 chs. to station, a post in stone mound from which an oak tree 22 inches

in diameter bears N. 17½ deg. W. 33 chs., and said madrona tree bears S. 82½ deg. W.; thence leaving said Mathewson's survey, N. 9 deg. W. 29.90 chs. to station; thence N. 70¾ deg. W. 10.70 chains to station post marked "A"; thence S. 73¾ deg. W. 16.65 chs. to station in center of the creek, known as the "Arroyo de Corte Madera del Presidio"; thence down the center of said creek with the meanders thereof according to William J. Lewis' survey of the Rancho Saucelito, approved October 2d, 1860, by the said Surveyor General, S. 39¾ deg. E. 1.50 chs. to station 11 of said Lewis' survey; thence S. 4½ deg. E. 10.74 chs. to station 12 of said Lewis' survey; thence S. 17 deg. E. 8.50 chs. to station 13 of said Lewis' survey; thence S. 35 deg. E. 10.30 chs. to station 14 of said Lewis' survey; thence S. 71¼ deg. E. 10.78 chs. to station 15 of said Lewis' survey; thence N. 70¾ deg. E. 3.90 chs. to station 16 of said Lewis' survey; thence S. 33¾ deg. E. 0.40 chs. to station in center of said Arroyo, and on line between sections 28 and 29, township one north, range six west, 17.55 chs. north of corner sections 28, 29, 32 and 33; thence leaving said creek and survey, N. 2.45 chs. to the post mar. "C. M. P. 181," the place of beginning. Containing 80 24-100 acres of land.

17th. That on or about the 19th day of January, 1875, the said Julius C. McCeney made, executed and delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all of the land described in said deed of February 1st, 1871, from said T. B. Deffebach et al. to said McCeney.

18th. Defendant avers, on his information and belief, that each and all of the grantees named in the deeds aforesaid purchased the lands and interests therein which the said deeds purported to convey in good faith and for a valuable consideration, and that the said grantees used, improved and continued in the actual possession of the said lands, including lot 3 in section 28 and lot 3 in section 29, in township one north, range six west, according to the United States Government surveys according to the lines of their original purchases, and that said lands were so used and improved as tenants in common by the said various grantees until the 14th day of February, 1871, on which day the various tenants in common, except said Throckmorton, made the conveyance aforesaid to said Julius C. McCeney, and that said conveyance was made to said McCeney, in trust for said Throckmorton, and in order to segregate the interest of said Throckmorton in said lands and convey the same in severalty to said Throckmorton, and in pursuance of

said trust, the said McCeney made, executed and delivered the said deed of January 19th, 1875, to said Throckmorton, and that ever since the said 1st day of February, 1871, up to the date of the deed to defendant, Jacob Gardner, hereinafter mentioned, the said Throckmorton and the executrix of his will after his death used and improved, and continued in the actual possession of the land described in the said deed of February 1st, 1871, to said McCeney, and the deed of January 19th, 1875, to said Throckmorton, substantially according to the lines of the said deeds, and that said Throckmorton, and all said other grantees, at the dates of said several purchases, believed in good faith that all of the lands conveyed by said deeds as aforesaid were included within the said Mexican grant to the said Juan Reed, and that the said Throckmorton, in good faith, entertained such belief until the date of his death, and
26 that the said Mexican grant aforesaid did purport to grant and convey all of the said lands described in the said deeds to the said McCeney and the said Throckmorton.

19th. That on or about the 19th day of January, 1875, the said Throckmorton, as a bona fide purchaser from Mexican grantees, made an application to the register and receiver of the United States Land Office at San Francisco, under Sec. 7 of the Act of the Congress of the United States, entitled "An Act to quiet titles in California," approved July 23rd, 1866, basing his application upon the facts hereinbefore set forth, and that the said Ebenezer Wormouth was a party defendant upon the said application of said Throckmorton in said land office, and claimed the said land as a pre-emptor, and contested said application.

20th. And defendant avers, on his information and belief, that evidence was introduced in the matter of the application and contest aforesaid, showing without conflict that all the facts hereinbefore set forth were true, and establishing all of said facts by competent evidence, but that, notwithstanding the said evidence which was given as aforesaid in said United States Land Office in San Francisco upon the said contest, and notwithstanding that there was no conflict in said evidence, and no evidence whatever on said contest which contradicted the said evidence or any part thereof, and that the said evidence was true, the register and receiver of the Land Office at San Francisco, on or about the 9th day of February, 1886, basing their decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced before them on said application as aforesaid,

the said Throckmorton was not in law or under the law entitled to purchase the said land, denied the application of said Throckmorton to purchase the said land, and that on appeal from the said decision to the commissioner of the General Land Office of the United States, on the proofs taken before the said register and receiver, the said commissioner, on or about the 18th day of June, 1890, also basing his deci-
27 cision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, affirmed the said decision of said register and receiver, and that on appeal from said decision of said commissioner, the Secretary of the Interior of the United States, on or about the 24th day of October, 1891, on the same proofs, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law that under the evidence and facts introduced as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, affirmed the said decision of the said commissioner, denying the application of said Throckmorton to purchase said land under said Act.

21st. That thereafter, upon the return of the instructions of the superior officers on said appeals to the United States Land Office at San Francisco, the register and receiver of the said land office, on or about the 20th day of July, 1892, notwithstanding the application of the said Throckmorton, and notwithstanding the fact that the said Throckmorton was entitled to purchase the said land under the said Act of Congress, did contrary to law, and basing their action on the erroneous construction of the law applicable to the case before them, and against the protest and objection of the representatives of said Throckmorton, allow the said plaintiff, Wormouth, to make proof and payment for the said land described in said deed to said Throckmorton, and issued to the said Wormouth a certificate of purchase for the said land as a commuted homestead entry.

22nd. That thereafter, on the 14th day of August, 1893, under and in pursuance of the said certificate of purchase and the rulings aforesaid of said officers of the Land Department of the United States, a patent was issued by the President of the United States to the said plaintiff, Ebenezer Wormouth, purporting to convey to him the lands described in the said deed to said Throckmorton.

23rd. That on or about the 28th day of May, 1883, the said Samuel R. Throckmorton died in the City and County
28 of San Francisco, State of California, leaving a will by which he bequeathed to his daughter, Susanna M. Throckmorton, all his property and estate.

24th. That on or about the 27th day of June, 1883, an order was duly given and made in and by the Superior Court of the City and County of San Francisco, State of California, whereby the said Susanna M. Throckmorton, who was named in said will as the executrix thereof, was duly appointed as such executrix, and whereby letters testamentary were duly ordered to be issued to her.

25th. That thereafter, on the 27th day of June, 1883, letters testamentary upon the estate of said decedent were duly issued to the said Susanna M. Throckmorton, who then was and up to the date of the distribution of the estate of said decedent continued to be the duly appointed, qualified and acting executrix of the will of said decedent.

26th. That on or about the 23rd day of September, 1889, an order and decree was duly given and made in and by said Superior Court of said city and county, whereby the whole estate real and personal of said decedent was distributed to the said Susanna M. Throckmorton.

27th. That on or about the 17th day of July, 1890, the said Susanna M. Throckmorton made, executed and delivered to the defendant, Jacob Gardner, a deed, whereby she conveyed to the said defendant, Gardner, all those certain parcels of land situate, lying and being in the County of Marin, State of California, and described as follows, to wit:

Lot 3 of section 28 and lot 3 of section 29, township one north, range six west, Mount Diablo base and meridian. Containing 43 acres of land more or less. Being a part of the property conveyed by and described in said deed from Julius C. McCeney to Samuel R. Throckmorton.

28th. That on the said 17th day of July, 1890, defendant, Jacob Gardner, entered under the said last mentioned deed into the possession, and has thence hitherto remained in the possession of the land conveyed by and described in the
29 said deed, except so much thereof as is described as follows, to wit:

Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chs. to a post marked "C. M. P. 181"; thence north 9 deg. east to a road known as the Blythedale road; thence northwesterly along said road about 10 chs. to a fence;

thence southwesterly along said fence to the creek on the easterly boundary line of the Rancho Saucelito; thence descending the said creek to the point of beginning.

That the defendant, Jacob Gardner, was always prevented by the plaintiff from entering into the possession of said excepted parcel.

29th. And defendant, Jacob Gardner, avers that he is the owner in equity of the said land described in the said deed from Susanna M. Throckmorton to him, and that the legal title to said land which is included in said patent from the United States to said Ebenezer Wormouth, is held in trust by the said plaintiff, Wormouth, for the defendant, Jacob Gardner.

Wherefore, defendant prays for a judgment of this Court that the land described in the said deed from Susanna M. Throckmorton to the defendant, Jacob Gardner, and the title thereof conveyed by the patent from the United States to the plaintiff, issued on the 14th day of August, 1893, is held by the plaintiff in trust for the defendant, Jacob Gardner, and that the said plaintiff be commanded and required to execute, acknowledge and deliver to the defendant, Jacob Gardner, a deed conveying to him all the said lands described in the said deed from Susanna M. Throckmorton, and including the land described in said Complaint, and that the defendant, Jacob Gardner, have such other and further relief as may be just and equitable, together with the costs of this action.

HEPBURN WILKINS,
Attorney for Defendant, Jacob Gardner.

[Duly verified.] [Duly filed.]

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[Title of Court and Cause.]

ANSWER TO CROSS-COMPLAINT.

The above-named plaintiff, Ebenezer Wormouth, answers the Cross-Complaint filed against him by the above-named defendant, Jacob Gardner, in the above entitled action as follows:

1. This plaintiff in answer to the second paragraph of said cross-complaint denies that the Rancho granted by the Governor of California, under the government of Mexico, to Juan Reed, included within its exterior limits the land described in the deed from T. B. Deffebach et al. to Julius C. McCeney of

February 14th, 1871, or any part thereof, except so much thereof as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al. Denies that the grant mentioned in the first paragraph of said cross-complaint included any part of the land in controversy in this action. Denies that any grant ever made by the Mexican Government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the 22nd paragraph of said cross-complaint.

2. Answering the fifth paragraph of said Cross-Complaint, this plaintiff denies that the land described in said deed of T. B. Deffebach et al. to Julius C. McCeney or any part thereof, except as in this answer hereinbefore set forth, was within the exterior boundaries of said Mexican grant.

3. Answering the eighth paragraph of said Cross-Complaint, this plaintiff denies that on the 12th day of August, 1865, or at any other time, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach and T. B. Deffebach, her husband, or any of them, made, executed or delivered for a valuable or any consideration, except as hereinafter stated, to J. Clinton
31 Bolton, a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in said Mathewson survey, but plaintiff avers that the only consideration which passed from said Bolton to the said grantors was an agreement by said Bolton to give his services as an attorney before the United States Courts and authorities to procure a patent for more land than was included in said Mathewson survey, or if no more land was patented, to procure such patent for the land included in the Mathewson survey.

4. In answer to the sixteenth paragraph of said Cross-Complaint, plaintiff denies that on or about the 1st day of February, 1871, or on any other day, month or year, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall made, executed or delivered to Julius C. McCeney a deed whereby they conveyed all that certain tract of land situated in the County of Marin, State of California, bounded and described as set forth in said paragraph sixteen of said cross-complaint or any part of said land save and except a small part thereof which lies within the boundaries of the patent for said land which was issued to the said Reed heirs on the 25th of February, 1885, which said excepted portion of said land lies without the boundary of the

land described in plaintiff's complaint in this action; and in that behalf this plaintiff avers that neither the said T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine nor H. C. Newhall did, on or about the 1st day of February, 1871, or at any other time, own or was entitled to own or entitled to convey to any one any of the land described in said sixteenth paragraph of said cross-complaint, save and except that part thereof lying within the bounds of said Reed patent.

5. Answering the seventeenth paragraph of said cross-complaint, plaintiff denies that on or about the 19th day of January, 1875, or at any other time, the said Julius C. McCeney made, executed or delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all of the land described in said deed of February 1st, 1871, from
32 said T. B. Deffebach et al. to said McCeney, or conveyed any part of said land to said Throckmorton save and except that portion thereof lying within the boundary of said Reed patent; and in that behalf this plaintiff further answering the seventeenth paragraph of said cross-complaint denies that said Julius C. McCeney did, on or about the 19th day of January, 1875, or at any other time, or at all, own, or was entitled to own, or was seized or possessed or was entitled to convey to any one any of the land mentioned and described in the said deed from said McCeney to said Throckmorton, save and except that portion which lies within the boundary of the land mentioned and described in plaintiff's complaint in this action.

6. Answering the eighteenth paragraph of said cross-complaint, this plaintiff denies that each, or all, or any, of the grantees named in the deeds mentioned or referred to in said eighteenth paragraph of said cross-complaint, purchased, or pretended to purchase, the lands or interests described or mentioned in said deeds, in good faith, or for a valuable consideration; denies that said grantees or any grantee named in said cross-complaint used or improved or continued in the actual possession of said lands, according to the lines of their original purchases or ever used, improved or possessed any part thereof, except as trespassers upon the possession and rights of this plaintiff, as alleged in his complaint in this action; denies that lot 3 in section 28 and lot 3 in section 29, township one north, range 6 west, were possessed or used or improved by any of the persons named as grantees in said cross-complaint as tenants in common or at all used by any of

said persons, except as trespassers as aforesaid, and denies that any part of said lot 3, in section 28, or of said lot 3, in section 29, was ever in the possession of the original purchaser, Bolton, or any of his grantees or successors in interest, until on or about the 1st day of October, 1872, when an attempt was made by said Throckmorton to enclose a portion of the public lands of the United States lying to the west of western boundary of the Rancho
33 Corte de Madera del Presidio, whereupon, to wit: on or about said 1st day of October, 1872, the plaintiff gave notice to said McCeney and said Throckmorton that the lands they were attempting to enclose or fence was owned and claimed by plaintiff. Denies that said deed to McCeney was made an order to segregate the interest, or any interest, of said Throckmorton. Denies that said Throckmorton or his executrix ever had any right to use or to improve any part of said lot 3 in section 28 or of said lot 3 in section 29; denies that said Throckmorton or his executrix was ever in the actual possession of the same or any part thereof except as intruders and trespassers upon the rights and possession of this plaintiff, and particularly deny that said defendants, or either of them, or any of their, or either of their, grantees or predecessors in interest were ever in the possession of the parcels designated respectively "A" and "B" in defendant's answer herein; denies that all, or any, of said grantees, particularly and specially said Throckmorton, believed in good faith, or at all believed, that all of the lands conveyed by said deeds, or any part or parcels of said lot 3 in section 28 and said lot 3 in section 29, were included within said Mexican grant, or that said Throckmorton in good faith, or at all, entertained any such belief; and denies that said Mexican grant did purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lot 3 in section 29.

7. Answering the nineteenth paragraph of said cross-complaint, this plaintiff denies that on or about the 19th day of January ,1875, or at any other time prior to October 20th, 1880, said Throckmorton made any application to the register and receiver, or either of them, to purchase said lands, and plaintiff denies that on said 20th day of October, 1880, or on said 19th day of January, 1875, or at any other time, the said Throckmorton, as a bona-fide purchaser from Mexican grantees, made an application to the register and receiver of the United States Land Office at San Francisco, under section 7 of the Act of Congress of the United States, entitled "An

Act to Quiet Titles in California," approved July 23,
34 1866, or basing his application upon the facts in said cross-complaint hereinbefore alleged, and denies that said Ebenezer Wormouth claimed said land on the hearing of said contest before said register and receiver as a pre-emptor. but on the contrary claimed the said land as a homestead claimant and offered proof of his entry and right as such homestead claimant.

7½. Answering the twentieth paragraph of said cross-complaint this plaintiff denies that the evidence introduced in the matter of the application and contest mentioned in nineteenth paragraph of said cross-complaint showed without conflict or showed at all that all the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are in this answer denied are or were true; denies that the evidence introduced in the matter of said application and contest established all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; denies that there was no conflict in said evidence; denies that there was no evidence whatever on said contest which contradicted Throckmorton's evidence or any part thereof; denies that the said alleged evidence was true; denies that the register and receiver of the land office in San Francisco, or either of them, on or about the 9th day of February, 1886, or at any other time, based their, or his, decision upon said alleged evidence or upon evidence without conflict; denies that said register and receiver, or either of them, rested their or his decison upon the proposition or upon a proposition of law that the said Throckmorton was not in law, or under the law, entitled to purchase the said land; denies that the Commissioner of the General Land Office, on appeal from the decision of the register and receiver, basing his decision upon evidence without conflict, or resting his decision upon the or upon a proposition of law, decided that said Throckmorton was not in law entitled to purchase said land; denies that the Secretary of the Interior based his decision upon evidence without conflict; denies that the said Secretary
of the Interior rested his decision, affirming the decision
35 of the Commissioner of the General Land Office upon the or upon a proposition of law; denies that said Throckmorton was a bona-fide purchaser from the Mexican grantees of the lands described in paragraph sixteen of said cross-complaint.

8. Denies that said Throckmorton as a bona-fide purchaser

from the Mexican grantees made the application to the register and receiver of the United States Land Office at San Francisco under section 7 of the Act of Congress entitled, "An Act to Quiet Titles in California"; denies that said Throckmorton was entitled to purchase said land, or any part thereof, under said Act of Congress; denies that the register and receiver of the land office at San Francisco did contrary to law; or did, basing their decision on an erroneous construction of the law applicable to the case before them, allow this plaintiff to make proof and payment for said land.

9. This plaintiff in answer to the matters alleged in paragraph twenty-seven of said cross-complaint denies that on or about the 17th day of July, 1890, or at all, the said Susanna Throckmorton made, executed or delivered to the defendant Jacob Gardner, a deed whereby she conveyed to said defendant, Gardner, all those certain parcels of land described as lot 3 of section 28 and lot 3 of section 29, township 1 north, range 6 west, Mount Diablo base and meridian. And in that behalf this plaintiff avers that said Susanna Throckmorton was not the owner of said land when she executed the alleged deed nor was she entitled to convey the same to said Gardner.

10. This plaintiff denies that on the 17th day of July, 1890, or at any other time, the defendant, Jacob Gardner, entered into the possession of said land under said deed from said Susanna M. Throckmorton, and denies that he has ever since remained in possession of said land except as an intruder and trespasser upon the possession of this plaintiff and further denies that said defendant, Jacob Gardner, ever entered into the actual or other possession of any part of the lands described respectively as "A" and "B" in the defendant's answer herein.

11. This plaintiff denies that said Jacob Gardner is, or ever was, the owner in equity of said land or of any part of
36 the land described in plaintff's complaint in this action, and in the United States patent issued to him on the 14th day of August, 1893, as alleged in the twenty-second paragraph of said cross-complaint; denies that this plaintiff holds said land or part thereof in trust, or otherwise or at all for the defendant, Jacob Gardner.

Wherefore plaintiff prays that defendant, Jacob Gardner, take nothing by his said cross-complaint, that the same be dis-

missed, and that plaintiff have judgment as prayed in his complaint herein.

E. B. MAHON and
L. D. McKISICK,
Attorneys for Plaintiff.

[Duly verified.] [Duly filed.]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly for trial without a jury, as to the issues raised and joined by the answer of the plaintiff to the cross-complaint of the defendant, Jacob Gardner, herein, and the like issues raised by the supplemental answer of said Peter Gardner and said Jacob Gardner, on file herein, a jury trial as to said issues having been duly waived. The plaintiff appeared by Messrs. E. B. Mahon and L. D. McKisick, his attorneys, and the defendants appeared by H. Wilkins, Esq., their attorney.

Evidence was introduced on behalf of the respective parties, and the case was duly argued and submitted, and by the Court taken under advisement, and the Court, being now fully advised, finds the following facts:

1st. That on the 20th of October, A. D. 1880, S. R. Throckmorton, defendant Jacob Gardner's predecessor in interest, filed an application in the office of the register and receiver of the United States Land Office at San Francisco, Cali-
37 fornia, to purchase lot 3 in section 28 and lots 2 and 3 and SE. ¼ and NE. ¼ section 29, township 1 north, range 6 west, Mount Diablo Meridian, under the seventh section of the Act of Congress of the United States, entitled "An Act to Quiet Land Titles in California," approved July 23rd, 1866.

That the plaintiff, Ebenezer Wormouth, was a party defendant upon said application of said Throckmorton in said land office, and on the hearing thereof claimed the said lot 3 in section 28 and said lots 2 and 3 in section 29, as a homestead claimant, and contested said application of Throckmorton.

2nd. That one of the questions decided by the United States register and receiver, and confirmed by the United States Commissioner of the General Land Office, and by the United States Secretary of the Interior in the said contest of Throckmorton vs. Wormouth, mentioned in the twentieth

paragraph of said cross-complaint herein, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed.

3rd. That the officers of the United States Land Department, to wit, the register and receiver, the Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact upon the evidence produced before said register and receiver on said contest, that the land in controversy in this action was not included in the said original grant by the Mexican government to Juan Reed.

4th. That a survey known as the Mathewson survey of said Rancho Corte de Madera del Presidio (commonly called the Reed Ranch) mentioned in the first paragraph of said cross-complaint, was made by authority of the United States, about seven years before the date of the deed of August 12th, 1865, from John J. Reed and others to J. Clinton Bolton, under whom defendant, Jacob Gardner, deraigns title, being the deed mentioned in the eighth paragraph of said cross-complaint. That said survey excluded the lands in controversy, and no survey of the said Rancho Corte de Madera del Presidio ever made by authority of the United States in-
38 cluded the lands in controversy.

5th. That the consideration paid by said Bolton to the Reed heirs (John J. Reed and others) for the said deed to him of 1865 was not a money consideration, that the only consideration which passed from said Bolton to the said grantors was an agreement by said Bolton to give his services as an attorney before the United States Courts and authorities to procure a patent for more land than was included in said Mathewson survey, or if no more land was patented, to procure such patent for the land included in the Mathewson survey.

6th. That the officers of the United States Land Department, to wit, the United States register and receiver, the Commissioner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of "Throckmorton vs. Wormouth," in denying said application of Throckmorton, did not base their decision upon a question of law alone, but did find and decide as a fact that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns.

7th. This Court further finds as follows: That the rancho granted by the Governor of California, under the government of Mexico, to Juan Reed, did not include within its exterior

limits the land described in the deed from T. B. Deffebach et al. to Julius C. McCeney of February 14, 1871, or any part thereof, except so much thereof as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al. That the grant mentioned in the first paragraph of said cross-complaint did not include any part of the land in controversy in this action. That no grant ever made by the Mexican government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the twenty-second paragraph of said cross-complaint.

8th. That the land described in said deed to T. B. Deffebach et al. to Julius C. McCeney, or any part thereof, except
39 as in the last finding above set forth, was not within the exterior boundaries of said Mexican grant.

9th. That on the 12th day of August, 1865, John J. Reed and others made, executed and delivered to J. Clinton Bolton, for the consideration mentioned in the fifth finding above set forth, a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in said Mathewson survey.

10th. That on or about the 1st day of February, 1871, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall made, executed and delivered to Julius C. McCeney a deed purporting to convey all that certain tract of land, situated in the County of Marin, State of California, bounded and described as set forth in paragraph sixteen of said cross-complaint.

But that neither the said T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle nor H. C. Newhall did on the said 1st day of February, 1871, or at any other time, own, or was or were entitled to convey to any one any of the land described in said sixteenth paragraph of said cross-complaint, except a small part thereof which lies within the boundaries of the patent for certain land, which was issued to the said Reed heirs on the 25th day of February, 1885, which said excepted portion of land lies entirely without the boundary of the land described in plaintiff's complaint in this action.

11th. That on the 19th day of January, 1875, the said Julius C. McCeney made, executed and delivered to S. R. Throckmorton a deed purporting to convey to said Throckmorton all of the land described in the said deed of February 1, 1871, from said T. B. Deffebach et al. to said McCeney, but

that the said McCeney on said 19th day of January, 1875, or at any other time, was not the owner and was not entitled to convey to any one any of the land mentioned and described in said deed from said McCeney to said Throckmorton, save and except that portion which lies within the boundary of said Reed patent, no part of which lies within the boundary of the land mentioned and described in plaintiff's complaint in this action.

12th. That none of the grantees named in the deeds mentioned or referred to in the eighteenth paragraph of said cross-complaint, purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and right of the plaintiff, as alleged in his complaint in this action.

That neither the said Throckmorton, nor his executrix, ever had any right to use or improve any part of said lot 3 in section 28 or of said lots 2 and 3 in section 29; that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff.

That the said defendants, nor either of them, nor any of their nor either of their grantors or predecessors in interest, ever were in the possession of the parcels designated respectively "A" and "B" in defendants' answer herein.

That the said grantees and each of them and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by said deeds, or any part or parcel of said lot 3 in section 28 and said lots 2 and 3 in section 29, were included within the said Mexican grant.

That said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lots 2 and 3 in section 29.

13th. That the evidence introduced in the matter of the application and contest mentioned in the nineteenth paragraph of said cross-complaint, did not show without conflict, or show at all, that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true; that the evidence introduced in the matter of said application and contest did not establish all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; that there was

41 conflict in said evidence; that there was evidence on said contest which contradicted Throckmorton's evidence; that the evidence as alleged in said cross-complaint was not true.

That the register and receiver of the land office at San Francisco did not, nor did either of them, on the 9th day of February, 1886, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict; that the said register and receiver did not, nor did either of them, rest their or his decision upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law or under the law entitled to purchase the said land.

That the Commissioner of the General Land Office, on appeal from the decision of the register and receiver, did not base his decison upon evidence without conflict, and did not rest his decision upon the or upon a proposition of law, in deciding that Throckmorton was not entitled to purchase the said land.

That the said Secretary of the Interior did not rest his decision, affirming the decision of the Commissioner of the General Land Office, upon the or upon a proposition of law.

That the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of Throckmorton vs. Wormouth, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph sixteen of said cross-complaint.

14th. That the said Throckmorton did, claiming to be a bona fide purchaser from Mexican grantees, make said application (to purchase) to the register and receiver of the United States Land Office at San Francisco, under section 7 of the Act of Congress entitled, "An Act to Quiet Land Titles in California."

That the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns and was not entitled to purchase the said land or any part thereof under said Act of Congress.

That the Register and Receiver of the said land office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow the plaintiff to make proof and payment for said land.

15th. That on about the 17th day of July, 1890, Susanna M. Throckmorton made, executed and delivered to the

42 defendant, Jacob Gardner, a deed in due form purporting to convey to said defendant, Gardner, all those certain parcels of land described as lot 3 of section 28 and lots 2 and 3 in section 29, T. 1 N., R. 6 W., Mount Diablo base and meridian; but the said Susanna M. Throckmorton was not the owner of said land when she executed said deed, nor was she entitled to convey the same to said Gardner.

16th. That the defendant, Jacob Gardner, did not on the 17th day of July, 1890, or at any other time, enter into the possession of said land under said deed or remain in possession thereof, except as an intruder and trespasser upon the possession of the plaintiff, and that the said defendant, Jacob Gardner, never entered into the actual or other possessions of any part of the lands described respectively as "A" and "B" in the defendant's answer herein.

17th. That the said Jacob Gardner is not and never was the owner in equity of said land, or of any part of the land described in plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the twenty-second paragraph of said cross-complaint.

That said plaintiff does not hold said land or any part thereof in trust or otherwise or at all for defendant, Jacob Gardner.

And as a conclusion of law from the foregoing facts:

The Court finds that neither the said defendant, Jacob Gardner, nor the defendant, Peter Gardner, should take anything by said cross complaint, or by said supplemental answer.

Dated March 8th, 1897. F. M. ANGELLOTTI, Judge.

[Duly filed.]

The case was thereupon argued by counsel for the respective parties, and the Court instructed the jury as follows:

43 In this action the plaintiff, Ebenezer Wormouth, seeks to recover from the defendants, Jacob Gardner and Peter Gardner, the possession of certain land, with damages for its detention since February 1st, 1891.

The land in controversy is the 46.26-100 acre tract described in the complaint, excepting therefrom the two parcels described in the answer, of which two parcels it appears the plaintiff was at the time of the commencement of the action and ever since has been in possession.

The plaintiff alleges that he was on February 1st, 1891, and ever since has been the owner and entitled to the possession of the land in controversy, which is denied by defendants.

It has been duly stipulated between the parties to this action that all of the issues made by the pleadings in this action shall be tried and determined by the Court sitting without a jury, excepting only the issues as to the damages claimed by plaintiff and as to the value of the rents and profits of the lands in controversy, which issues are to be determined by you.

Determining the issues to be disposed of by it, the Court now finds the following facts from the evidence introduced on this trial, viz:

1st. Tht on the first day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of in the possession of and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains more or less to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being
44 lot 3 of section 28 and lot 3 of section 29, township No. 1 north, of range No. 6 west, M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

2d. That on said 1st day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except those portions thereof bounded and described as follows):

"A"—Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chains to a post marked "C. M. P. 181"; then north 9 degrees to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a

fence; thence southwesterly along said fence to the said creek; thence descending the said creek to the point of beginning.

"B"—Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of the said Blythedale road; running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of said rancho; thence along said fence north 8 degrees 10 minutes 514 5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence, running at an acute angle from said last fence; thence along said fence running at an acute angle south 8 degrees 30 minutes west 277 5-10 feet; south 16 degrees 55 minutes west 143 7-10 feet; south 22 degrees 11 minutes west to the said northerly line of said Blythedale road; thence southeasterly along the said northerly line of said road to the place of beginning).

And ever since has been wrongfully and unlawfully withheld and still withhold the possession thereof from plaintiff.

The above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs you that your verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the
45 land in controversy, i. e., all of the said 46 26-100 acre tract described in the Complaint. Save and except the two parcels thereof which are now in plaintiff's possession.

Counsel for defendants thereupon, before the jury retired, excepted in open Court to the following portions of the instructions to the jury, to wit:

1st. To that portion of the instructions in which the Court instructed the jury that on the 1st day of February, 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of the land described in the plaintiff's complaint, and also described in the said instruction.

2nd. To that portion of the instructions in which the Court instructs the jury that the above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs the jury that their verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, i. e., all of the 46 26-100 acre tract described in the complaint, save and ex-

cept the two parcels thereof which are now in plaintiff's possession.

[Duly filed.]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff for the recovery from the defendants of the possession of all the land in controversy (viz: the 46 26-100 acre tract described in the complaint, except the two portions thereof described in the answer and designated therein "A" and "B"), and we assess the damages for withholding the said
46 property at Two Thousand ($2,000) Dollars, for which sum we find for plaintiff against said defendants.

A. GERICKE, Foreman.

[Duly filed.]

[Title of Court and Cause.]

JUDGMENT.

This cause heretofore, to wit, on the 9th, 12th, 13th and 19th days of February, 1897, came on regularly for trial before the Court without a jury, as to the issues raised and joined by the answer of the plaintiff to the cross-complaint of the defendant, Jacob Gardner, herein, and the like issues raised by the supplemental answer of said Peter Gardner and said Jacob Gardner, on file herein, a jury trial as to said issues having been duly waived.

The plaintiff appeared by Messrs. E. B. Mahon and L. H. McKisick, his attorneys, and the defendants appeared by H. Wilkins, Esq., their attorney. Evidence was introduced on behalf of the respective parties and the case was duly argued and submitted, and by the Court taken under advisement, and afterwards, to wit, on the 8th day of March, 1897, the Court duly made and submitted its findings of fact and conclusions of law herein.

And afterwards, to wit, on the 19th, 20th and 21st days of April, 1897, this cause came on regularly for trial as to the issues raised and joined by the answer of the defendants to the plaintiff's amended complaint herein, a jury of twelve persons was regularly impaneled and sworn to try said action.

Witnesses on the part of the plaintiff and defendants, respectively, were sworn and examined, and oral and documentary evidence on behalf of the respective parties was offered and put in evidence.

47 After hearing the evidence and the arguments of the counsel, and the instructions of the Court, and the jury having retired to consider their verdict, and subsequently returned into Court, and being called answered to their names and say they find a verdict for plaintiff, as follows:

[Title of Court and Cause.]

"We, the jury in the above-entitled cause, find for the plaintiff for the recovery from the defendants of the possession of all the land in controversy (viz: the 46 26-100 acre tract described in the complaint, except the two portions thereof described in the answer and designated therein "A" and "B"), and we assess the damages for withholding the said property at Two Thousand ($2,000) Dollars, for which sum we find for plaintiff against said defendants.

"A. GERICKE, Foreman."

Wherefore by reason of the law and the findings and verdict aforesaid, it is ordered, adjudged and decreed that the defendant Jacob Gardner take nothing by his said cross-complaint, and that defendants take nothing by their supplemental answer herein, and that the plaintiff, Ebenezer Wormouth, do have and recover of and from the defendants, Peter Gardner and Jacob Gardner, the possession and restitution of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio, running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east 20.25 chains, thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning, being lot three (3) of Section twenty-eight (28) and lot three (3) of Section twenty-nine (29) in township No. 1 north, range

48 No. 6 west, M. D. M., containing forty-six and twenty-sixth hundredths (46 26-100) acres of land, with the tene-

ments, hereditaments and appurtenances thereunto belonging or in any wise appertaining (except that portion thereof bounded and described as follows:

"A." Beginning at a post marked "C. M. P. 180," running thenec due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the said creek, thence descending said creek to the point of beginning.

"B." Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of said Blythedale road, running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of the said rancho, thence along said fence north 8 degrees 10 minutes west 514 5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle south 8 degrees 30 minutes west 277 5-10 feet, south 16 degrees 55 minutes west 143 7-10 feet, south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.)

2nd. That the said plaintiff have and recover of and from the said defendants the sum of Two Thousand ($2,000) Dollars damages for withholding said property.

3rd. That the said plaintiff do have and recover of and from the said defendants his costs and disbursements herein, taxed at $240.76.

Done in open Court this 21st day of April, A. D. 1897.

F. M. ANGELOTTI, Judge.

Entered April 22nd, 1897.

THOS. S. BONNEAU, Clerk.

[Title of Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

To E. B. Mahon, Esq., and L. D. McKisick, Esq., Attorneys for Plaintiff—

Please take notice that the defendants above named intend to move and will move the above-entitled Court to set

49 aside and vacate the decision of the Court, the verdict of the jury and the judgment heretofore entered herein, and to grant a new trial of said action, and a new trial of all the issues made by the cross-complaint of the defendants and the answer thereto of the plaintiff, the supplemental answer of said defendants and all the issues determined and decided by the Court upon the plaintiff's complaint and the answer of the defendants thereto, and all the issues submitted to and determined by the jury in said action, and that said motion will be made upon the following grounds, to wit:

1st. Insufficiency of the evidence to justify the decision of the Court in said action.

2nd. Insufficiency of the evidence to justify each of the decisions of the Court in said action.

3rd. Insufficiency of the evidence to justify the verdict of the jury in said action.

4th. That the decision of the Court in said action is against law, and that each of the decisions of the Court therein is against law, and that the verdict of the jury in said action is against law.

5th. Errors of law occurring at the trial and excepted to by the plaintiff.

6th. Misconduct of the jury.

7th. Excessive damages appearing to have been given under the influence of passion and prejudice.

Said motion will be made on a Bill of Exceptions to be hereafter prepared, served, settled, allowed, signed and filed as provided by law and upon affidavits.

HEPBURN WILKINS,
Attorney for Defendants.

Due service of the within notice admitted this 27th day of April, 1897.

E. B. MAHON and
L. D. McKISICK,
Attorneys for Plaintiffs.

[Duly filed.]

BILL OF EXCEPTIONS.

PART I - - - EQUITABLE ISSUES.

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be it remembered that this action came regularly on for trial on the 9th day of February, 1897, E. B. Mahon, Esq., and L. D. McKisick, Esq., appearing for the plaintiff, and Hepburn Wilkins, Esq., appearing for the defendants. The Court first proceeded with the trial of the issues raised by the cross-complaint of the defendant, Jacob Gardner, and the answer thereto of the plaintiff and the supplemental answer of the plaintiffs on file herein.

DERAIGNMENT OF TITLE.

The plaintiff offered and read in evidence the following deeds:

1st. A deed from John J. Reed, Hilarita M. Reed, Inez Reed Deffebach and Thomas B. Deffebach, her husband, to J. Clinton Bolton, dated August 12th, 1865, and recorded in Book "E" of Deeds, at page 400, in the County Recorder's office of Marin County, State of California, purporting to convey to said Bolton, in consideration of the sum of $1.00 and other good and valuable considerations, the undivided one-half of all that portion of the Mexican grant situated in Marin County, State of California, and known as the Rancho Corte Madera del Presidio, which was not included in what is known as the Mathewson survey of said grant, "made under instructions from the U. S. Surveyor General for the State of California by R. C. Mathewson, U. S. Deputy Surveyor, in October, 1858, and approved by Mandaville, U. S. Surveyor General for California, September 19th, 1859, said approved survey containing four thousand four hundred and sixty and twenty-four hundredths (4,460.24) acres of land, it being expressly understood that this deed conveys no interest in the 4,460.24 acres embraced in the above approved survey," which said Mathewson survey is mentioned and described in the said cross-complaint.

2nd. A deed from said James Clinton Bolton to R. Stein-

back, dated the 16th day of September, 1865, and recorded in Book "E" of Deeds, at page 417, purporting to convey, in consideration of the sum of $5.00, the undivided one-fourth of all that portion of the said Mexican grant which was not
51 included in said Mathewson survey.

3rd. A deed from R. Steinback to Emil Steinback, dated the 28th day of March, 1866, and recorded in Book "E" of Deeds, at page 569, in said Recorder's office, purporting to convey, in consideration of the sum of $1,000.00, to said Emil Steinbach the same land conveyed to him as aforesaid by said Bolton.

4th. A deed from Emil Steinback to Emil Grisar, dated the 16th day of June, 1866, and recorded in Book "F" of Deeds, at page 278, in said Recorder's office, purporting to convey, in consideration of the sum of $1,250.00, to the said Grisar the same land described in said deed from R. Steinback to Emil Steinback.

5th. A deed from Emil Grisar to Samuel R. Throckmorton dated the 19th day of June, 1866, and recorded in the said County Recorder's office, in Book "F" of Deeds, at page 278, purporting to convey to the said Throckmorton, in consideration of the sum of $1,250.00, the same land described in said deed from E. Steinback to E. Grisar.

6th. A deed from J. Clinton Bolton to T. B. Valentine, dated the 26th day of July, 1868, and recorded in said Recorder's office in Book "G" of Deeds, at page 116, purporting to convey to the said Valentine, in consideration of the sum of $1,500.00, all of the undivided one-fourth part of that portion of said Mexican grant which was not included in said Mathewson survey.

7th. A deed from John J. Reed to Hugh A. Boyle, dated the 11th day of May, 1869, and recorded in the said Recorder's office, in Book "J" of Deeds, at page 9, purporting to convey to said Boyle, in consideration of the sum of $5.00, all the right, title and interest of said John J. Reed in and to all of said "Rancho Corte Madera del Presidio," which is not included in said "Matthewson survey."

8th. A deed from Hilarita Reed to said Hugh A. Boyle, dated the 24th day of May, 1869, and recorded in Book "J" of Deeds, at page 11, purporting to convey to the said Boyle, in consideration of the sum of $5.00, all the right, title and
52 interest of said Hilarita Reed in and to all of said "Rancho Corte de Madera del Presidio," which is not included in said Matthewson survey.

9th. A deed from T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall to Julius C. McCeney, dated the 1st day of February, 1871, recorded in said Recorder's office in Book "J" of Deeds at page 24, purporting to convey to the said McCeney in consideration of $5.00 the tract of land described in the sixteenth paragraph of the said cross-complaint of the defendants herein.

10th. A deed from said Julius C. McCeney to Samuel R. Throckmorton, dated the 19th day of January, 1875, and recorded in the said Recorder's office in Book "Q" of Deeds at page 206, purporting to convey to said Throckmorton in consideration of the sum of $1.00 all of the said land described in said sixteenth paragraph of said cross-complaint.

11th. A deed from Susanna M. Throckmorton to the defendant, Jacob Gardner, dated the 17th day of July, 1890, and recorded in the said Recorder's office in Book "11" of Deeds at page 507, purporting to convey to said Jacob Gardner in consideration of the sum of $10.00 all of those parcels of land situated in said Marin County, State of California, and being lot No. 3 of section 28 and lot No. 3 of section 29 in township 1 north, range 6 west, Mount Diablo base and meridian, and containing 43 acres of land more or less, being a portion of the property conveyed by and described in said deed from Julius C. McCeney to said Samuel R. Throckmorton.

The plaintiff next offered and read in evidence the petition of Juan Reed to Jose Figueroa, Senor General of the Territory of Upper California, praying for the grant of the tract of land known as the Rancho Corte Madera del Presidio, dated September 4th, 1834, also the grant from said Jose Figueroa, Senor General, to the said Juan Reed, dated October 2nd, 1834, also certain other papers connected with said grant, all of which papers were in the Spanish language and correct translations of which are set forth in the testimony and proceedings in the contested land case of S. R. Throck-
53 morton vs. Ebenezer Wormouth, which was pending in the Land Office of the United States before the Register and Receiver of such land office in the city of San Francisco, which testimony and proceedings in said contested land case are hereinafter set forth and the translations aforesaid are here referred to, said translations being marked respectively Ex. "D," Ex. "E," and Ex. "D" and "E" and said translations were duly admitted by counsel to be correct. The defendants here offered in evidence the decree of confirmation by the Board of United States Land Commissioners to settle land

claims in California, filed June 13th, 1854, in case No. 497 before said Board in the case entitled "The Heirs of Juan Reed vs. The United States," and the decree of the United States District Court for the Northern District of California in case No. 183 entitled "The United States, Appellants, vs. Heirs of John Reed, Appellees," filed therein January 14th, 1856, confirming said grant, being Exhibit "F" and "G" in the record of said contested land case of S. R. Throckmorton vs. E. Wormouth hereinafter set forth.

The defendants then offered in evidence the diseno or map which was attached to the petition of Juan Reed to Jose Figueroa, Senor General of California, as the same appears in the transcript of the record from the Board of United States Land Commissioners in the case entitled The United States vs. Heirs of Juan Reed in the United States District Court for the Northern District of California, No. 183. The following is a certified copy of said diseno or map:

[Map.]

See original transcript.

I, Southard Hoffman, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be full, true and correct tracing of a map attached to the petition of Juan Reid, as the same appears in the Transcript of the Record from the Board of United States Land Commissioners in the case entitled "The United States vs. Heirs of Juan Reid," United States District Court, No. 183, now remaining on file in my office.

54 Attest my hand and seal of said District Court this 15th day of February, A. D. 1895.

SOUTHARD HOFFMAN,

[Seal] Clerk.

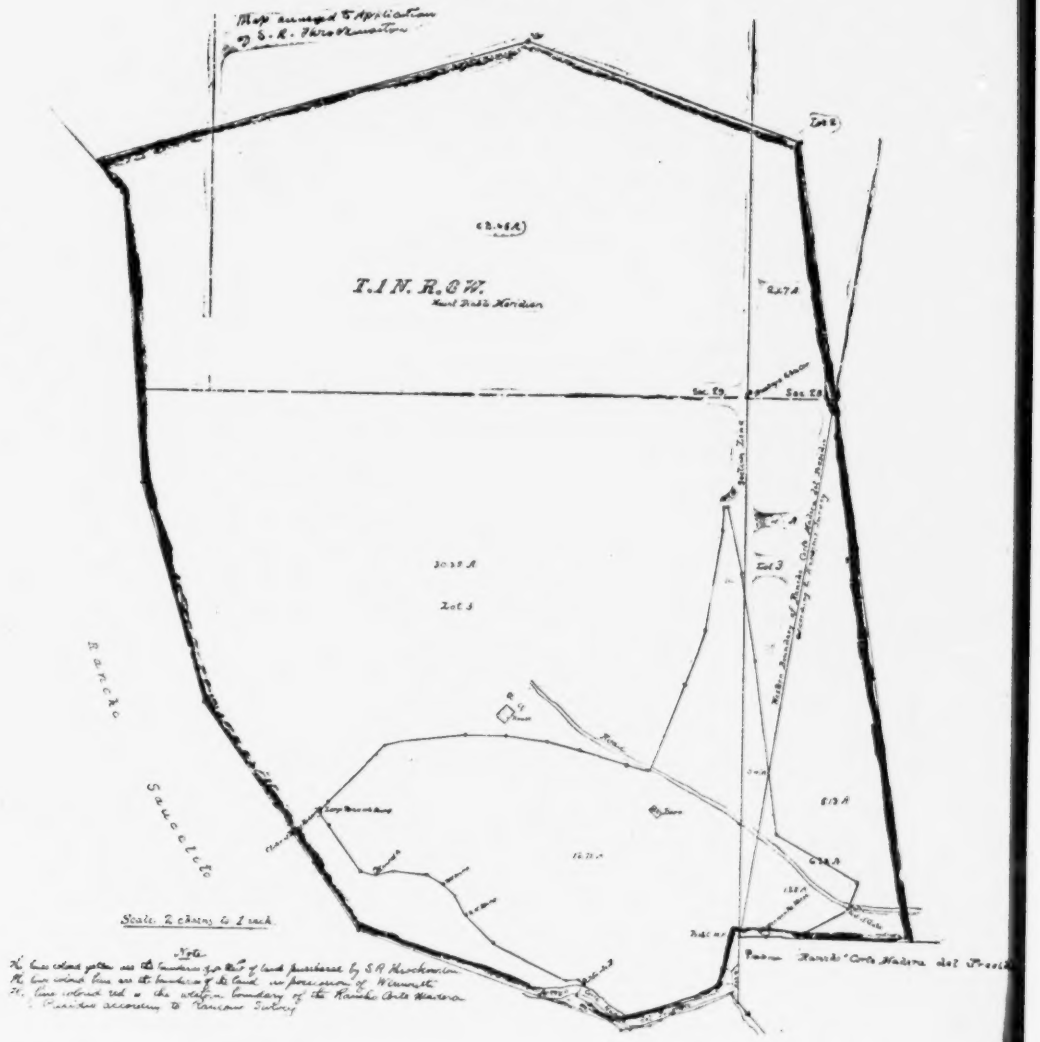
TRANSCRIPT OF TESTIMONY AND PROCEEDINGS IN GENERAL LAND DEPARTMENT.

Defendants counsel then offered and read in evidence the certified copy of all of the testimony and proceedings in the General Land Office in the matter of the contested case of S. R. Throckmorton against Ebenezer Wormouth, which are in substance as follows:

To the Register and Receiver of the United States Land Office at San Francisco, California, and to the Honorable Commisioner of the General Land Office, Washington, D. C.

16877

47 A


Map accompanying Application of S. R. Thurston
T. 1 N. R. 6 W.
Zot 8
Zot 7
Zot 4
Zot 3
Zot 5
Sec. 29
Sec. 28
Section Lines
Waiakea Boundary of Royal Grants
Waiakea Grant
Waiakea Grant
Waiakea Grant

Now comes SAMUEL R. THROCKMORTON, a native-born citizen of the United States, over the age of twenty-one years, residing in the City and County of San Francisco, State of California, and respectfully shows that he is a purchaser of a portion of the Rancho Corte Madera del Presidio in Marin County, State of California, granted to Juan Reed by the Mexican Government, and confirmed by the United States District Court for the Northern District of California, surveyed by the United States Surveyor General for California, and the survey, so far as the western line of said Rancho Corte Madera del Presidio is concerned, duly approved by the Honorable Secretary of the Interior, by his decision dated May 3rd, 1880, and hereby applies to purchase under the seventh section of the Act of Congress approved July 23rd, 1866; that portion of the Rancho Corte Madera del Presidio, excluded from the final survey of said Rancho, situate, lying and being in sections 28 and 29, township 1 north, range 6 west, Mount Diablo meridian, containing seventy-three and 86-100 (73.86) acres, as shown by the accompanying survey of said tract so ex-
55 cluded, made by G. F. Allardt, Deputy United States Surveyor for the State of California, and in support of his application to purchase herewith files his affidavit, together with certified copies of the deeds of conveyance from the several parties from whom he deraigned title, viz. deed from John J. Reed et al. to James C. Bolton, dated August 12, 1865; deed from James C. Bolton to Rodolph Steinbach, dated September 16, 1865; deed from Rodolph Steinbach to Emil Steinbach, dated March 28, 1866; power of attorney from Emil Steinbach to Rodolph Steinbach, dated February 18, 1864; deed from Emil Steinbach to Emil Grisar, dated June 16, 1866; deed from Emil Grisar to S. R. Throckmorton, dated June 19, 1866; deed from J. C. Bolton to Thos. B. Valentine, dated July 25, 1868; deed from John J. Reed to Hugh A. Boyle, dated May 11, 1869; deed from Hilarita Reed to Hugh A. Boyle, dated May 24, 1869; deed from Thos. B. Deffebach et al. to Julius C. McCeney, dated February 1, 1871; deed from Julius C. McCeney to S. R. Throckmorton, dated January 19, 1875.

The tract sought to be purchased was excluded from the final survey aforesaid, and is now in the possession of your petitioner, and he asks that he be permitted to purchase same as provided in the seventh section of the Act of Congress approved July 23, 1866.

That the land sought to be purchased by applicant is included and embraced within the exterior boundaries of the

Rancho Corte Madera del Presidio, granted to Juan Reed by the Mexican Government and confirmed to his heirs by the United States.

S. R. THROCKMORTON.

San Francisco, October 20th, 1880.

State of California,

City and County of San Francisco—ss:

SAMUEL R. THROCKMORTON, being first duly sworn, upon his oath deposes and says. That he is a native-born citizen of the United States, over the age of 21 years; is a resident of the City and County of San Francisco, State of Cali-
56 fornia, that he has acquired by purchase from the heirs of Juan Reed, the original Mexican grantee of the Rancho Corte Madera del Presidio, for a valuable consideration, that certain piece or parcel of land in Marin County, State of California, situate in sections 28 and 29, township 1 north, range 6 west, Mount Diablo meridian, containing eighty and 24-100 acres, being a portion of the Rancho Corte Madera del Presidio, granted by the Mexican Government to Juan Reed, and confirmed to the heirs of said Reed by the United States District Court for the Northern District of California; that said rancho has been surveyed by the United States Surveyor General for California, and the western line thereof duly approved by the Honorable Secretary of the Interior, in his decision dated May 3rd, 1880; that by said survey and decision the western line of said rancho has become established and approved; that 73 and 86-100 acres of the land purchased by affiant from the heirs of Juan Reed, Mexican grantees or their assigns, has been excluded from the final survey of said rancho; that said tract of land so excluded is embraced within the exterior boundaries of the Rancho Corte Madera del Presidio, confirmed to the heirs of Juan Reed, and forms a part thereof; that affiant, ever since June 19, 1866, has been in the actual, quiet and peaceable possession of said tract of land, according to the lines of the original grant and deed of conveyance to him, and has used and improved the same, save and except that portion described in the field notes—(marked Exhibit "A")—attached hereto and made a part hereof, which is not in his possession, but it is also sought to be purchased by him; that a portion of the land, viz: 6 and 38-100 acres, so purchased, is included in the survey of the Rancho Corte Madera del Presidio; that a survey of said tract of land excluded from the final survey of said rancho and sought to be pur-

chased by affiant has been made by G. F. Allardt, Deputy United States Surveyor, and the field notes thereof are filed herewith and made a part hereof—marked Exhibit "B"—that there are no valid adverse rights or titles to said tract of land to his knowledge; that the government lands in town-
57 ship 1 north, range 6 west, Mount Diablo meridian, have been surveyed, and by order of the Honorable Commisioner of the General Land Office, the official plat of survey was filed in the United States Land Office at San Francisco, California, on the 2nd day of August, 1880; that this is the first opportunity affiant has had to present his claim for the land excluded from the final survey of said rancho, and he now applies to purchase the same as provided by the seventh section of the Act of Congress, approved July 23, 1866; that to the best of affiant's knowledge and belief the lands sought to be purchased contain no mines of gold, silver, copper or cinnabar; that the tracts of land sought to be purchased are designated on the official plat of township 1 north, range 6 west, Mount Diablo meridian, as lot No. 3 of section 28, containing 3 and 16-100 acres; part of lot 2, section 28, containing 2 and 27-100 acres; part of northeast quarter of section 29, containing 22 and 16-100 acres; part of lot 2, section 29, containing 2 and 87-100 acres, and the whole of lot 3, section 29, containing 43 and 10-100 acres, making a total of 73 and 86-100 acres; that the land purchased as aforesaid is enclosed by a good, substantial enclosure; that the land not in possession of affiant, viz: 14 and 61-100 acres, is within his said enclosure, and a suit in ejectment is now pending, wherein affiant seeks to recover the possession of the same.

S. R. THROCKMORTON.

Subscribed and sworn to before me this 20th day of October, 1880.

J. A. ROBINSON,
United States Commissioner.

Exhibit A—Tract excepted—Beginning at a post marked "C. M. P. 181" from which a madrona tree 4 feet diam. marked "B. T. C. M. P. 181" bears S. 24 E. 87 links distant; thence according to the true meridian the magnetic variation being 16 degrees 30 minutes east, as follows:

1. East 1.00 to E. Wormouth's house (the line cuts off the southeast corner of the house), 2.12 to Wormouth's
58 fence; thence along this fence as follows:

2. N. 60 E. 2.23 to south part of a gate across road; course of road E. and W.

3. N. 15½ E. 1.11 to angle in fence.

4. N. 60 W. 3.53 to angle in fence, the road continues N. 60 W.

5. N. 8. W. 6.50 to angle in fence.

6. N. 9. W. 3.40 " "

7. N. 14½ W. 2.58 " "

8. West 0.10 " "

9. S. 8. W. 0.34 " "

10. S. 0.½ W. 0.50 " "

11. S. 9.¾ W. 3.77 " "

12. S. 18.½ W. 2.22 to angle in fence from which the north end of a barn bears S. 12.½ W.

13. S. 21.¾ W. 3.48 to angle in fence on south side of said road, the north end of barn bears S. 12 degrees E. 1.31 chains distant.

14. N. 71 W. 0.88 to angle in fence, the road now turns to the right.

15. N. 75.½ W. 1.83 to angle in fence.

16. N. 72.¾ W. 1.22 " "

17. N. 84.½ W. 1.50 to angle in fence, the nearest corner of a house bears north 44 links distant.

18. N. 88 W. 159 to angle in fence.

19. S. 83.¼ W. 2.40 " "

20. S. 74 W. " "

21. S. 47 W. 0.44 " "

22. S. 44 W. 2.56 " "

23. S. 40.½ W. 0.48 to an angle in fence in cluster of young redwood trees at 40 links on this course a large redwood stump is four links to the left.

24. S. 32 E. 0.64 to an angle in fence.

25. S. 35.½ E. 2.02 to an angle in fence.

26. S. 77 E. 0.65 to a laurel 8 inches diam. in a cluster which I marked "A" standing near the north bank of the Arroya Corte Madera del Presidio.

59 27. N. 71 E. 0.72 to angle in fence.

28. S. 83.½ E 1.23 to angle in fence near arroya.

29. S. 61 E. 0.75 to angle in fence on south edge of a large redwood stump.

30. S. 47 E. 0.61 to angle in fence.

31. S. 30 E. 0.85 to large redwood stump in cluster of young redwoods at angle in fence.

32. S. 47 E. 1.41 to angle in fence.
33. S. 65 E. 3.19 " "
34. N. 83 E. 0.33 " "
35. S. 50 E. 0.23 to a sixforked maple on the north bank of said arroya, which I marked "B" cross arroya.
36. S. 15 W. 0.45 to angle of fence on south bank of said arroya.
37. S. 63 E. 0.63 to an angle in fence.
38. S. 48 E. 0.90 " "
39. S. 57 E. 0.55 " "
40. N. 84.½ E. 1.00 " "
41. N. 63 E. 0.50 " "
42. N. 63 E. 0.47 " "
43. N. 70 E. 1.10 " "
44. N. 65.¼ E. 1.39 to an angle in fence, thence along fence and re-said arroya.
45. N. 60 E. 0.25 to point in the 180th course of the Matthewson survey of the Rancho Corte Madera del Presidio; thence along said 180th course.
47. North 1.22 to post C. M. P. 181, the place of beginning, containing 14 and 65-100 acres.

G. F. ALLARDT,
Surveyor.

Exhibit B—Field notes of a tract of land situated in Marin County, California, and surveyed for Samuel R. Throckmorton, Esq., by G. F. Allardt, Surveyor. Magnetic variation 16 degrees 20 minutes east.

Beginning at a post marked C. M. P. 181, distant 20 chains north of corner sections 28, 29, 32, 2, 33, T. 1 N., R. 6 W.,
60 from which a madrona 4 feet diameter marked B. T. C. M. P. 181 bears S. 24 E. 87 links distant. (This post is station No. 181 of R. C. Matthewson's survey of the Rancho Corte Madera del Presidio); thence along the line of said Matthewson's survey:

1. East 1.00 Wormouth's house is 5 links to left, 2.10 cross fence course N. 60 E. 6.38 to station set a post in mound of stone from which an oak 22 inches diameter bears N. 17.½ W. 3.33 chains and said madrona bears S. 82.½ W.; thence leaving said survey and over slightly rolling ground.

2. N. 9 W. 1.00 cross fence, course E. and W. 1.20 cross road, course E. and W. and enter ploughed field 15.36 cross fence, course N. 71 W. S. 71 E. and leave field; 15.58 cross dry

ravine, course S. 70 E. 29.90 to station. Set a post and descend.

3. N. 70.¾ W. 2.10 cross same ravine, course southerly and ascend steep slope; 10.70 to station on top of grassy spur. Set a post marked "A" and descend.

4. S. 73.¾ W. 8.50 to foot of steep slope opposite corner of field 14.20 cross fence and bars, course N. 15 W. 16.50 to redwood stump 27 inches diameter (which I marked W.) on left bank of the Arroyo Principal de Corte Madera del Presidio; 16.65 to station in center of creek; thence down the center of said creek with the meanders thereof, according to Wm. J. Lewis' survey of the Rancho Saucelito.

5. S. 39.¾ E. 1.50 to station S. 11 of said Lewis' survey.

6. S. 4.½ E. 10.74 to station S. 12 of said Lewis' survey.

7. S. 17 E. 8.50 to station S. 13 of said Lewis' survey.

8. S. .35 E. 10.30 to station S. 14 of said Lewis' survey (at 5 chains to junction of right branch of said arroyo, bears west).

9. S. 71.¼ E. 10.78 to station S. 15 of said Lewis' survey.

10. N. 70.¼ E. 3.90 to station S. 16 of said Lewis' survey.

11. S. 33.¾ E. 0.40 to station in center of said arroyo and on line between sections 28 and 29, T. 1 N., R. 6 W., 17.55 chains north of corner sections 28, 29, 32 and 33; thence leaving said creek and survey.

12. North 2.45 to the post C. M. P. 181, the place of
61 beginning. Containing 80 and 24-100 acres.

G. F. ALLARDT,
Surveyor.

UNITED STATES LAND OFFICE,

San Francisco Cal., December 11, 1896.

I hereby certify that the annexed is a full, true and correct copy of application of S. R. Throckmorton to purchase portions of sections 28 and 29, township 1 north, range 6 west, M. D. M., now on file in this office.

JOHN P. DUNN,
Register.

UNITED STATES LAND OFFICE,

San Francisco, Cal., February 7, 1881.

S. R. Throckmorton	J. A. Robinson Esq., Attorney.
vs.	Jas. F. Stuart Esq.
Ebenezer Wormouth	Attorney.

S. R. Throckmorton on October 20, 1880, made application to purchase, under seventh section Act of July 23, 1866, lot 2, section 28, and lots 2 and 3 and S. E. ¼ of N. E. ¼, section 29, T. 1 N., R. 6 W., M. D. M.

Ebenezer Wormouth filed D. S. 10,661 December 18, 1874, alleging settlement March 1, 1859, for lot 3, section 28, and lot 3, section 29, same township and range.

Said filing was decided to be premature and illegal by letter of Hon. Comr., G. L. O., of Aug. 31, 1880, "G" in case of R. S. Brown.

Said Wormouth on Sept. 14, 1880, filed D. S. 15517, alleging settlement March 5, 1859, claiming the same land as in
62 his previous filing.

On May 20, 1881, said Wormouth made H. E. No. 4415 upon the same land.

Township plat filed Dec. 5, 1874.

Sections 16, 17, 20, 21, 28 and 29 suspended March 1, 1875. Suspension removed except as to lots 2 and 3, section 28, and lots 2 and 3 and S. E. ¼ of N. E. ¼, section 29, August, 1875, by letter of Surv'r Gen'l for Cal. of Aug. 7, 1875.

Plat withdrawn from office Aug. 13, 1875, and returned and filed in this office Aug. 2, 1880.

WM. R. WHEATON,
Register.
CHAS. H. CHAMBERLAIN,
Receiver.

Exhibit A.

In the
United States Land Office,
For the San Francisco District,
San Francisco, Cal.

The People of the United States to Mrs. H. R. Cushing and E. Wormouth—Greeting:

You are hereby summoned to appear before us at our office in the City of San Francisco on Monday, the 7 day of Feb'y,

A. D. 1881, at 9 o'clock a. m. to contest the claim of S. R. Throckmorton, averring your claim to the lots 2 and 3, section 28, and lots 2 and 3 and S. E. ¼ of N. E. quarter of section No. 29, township 1 N. of range 6 W. M. D. M. to be unjust and illegal and then and there do you show cause, if any there be, why the claim of said S. R. Throckmorton shall not be recognized as just and legal, and he be allowed to enter the said land.

Given under our hands this 15 day of Dec., A. D. 1880.

WM. R. WHEATON,
Register.
CHARLES. H. CHAMBERLAIN,
Receiver.

Service of a copy of the within summons ackuowl-
63 edged this 31 day of Dec., 1880.

E. WORMOUTH,
H. R. CUSHING.

Witness.

JACOB GARDNER.
509 Montgomery street, rooms 3 and 4.

San Francisco, Feb'y 5th. 1881.

Register and Receiver,
U. S. Land Office, San Francisco, Cal.

Stipulated: That the case of Throckmorton vs. Cushing and Wormouth—after opening the case on Monday by taking the testimony of S. R. Throckmorton, may be continued to suit the convenience of Land Office for a period of three weeks, and upon due notice being given by the attorneys.

J. A. ROBINSON,
Attorney for S. R. Throckmorton.
JAMES F. STUART,
Attorney for E. Wormouth.

Before U. S. Land Office,
San Francisco.

In the matter of the application of Samuel R. Throckmorton to purchase a portion of sections 28 and 29, township 1 north, range 6 west, M. D. B. and M.

Deposition of Samuel R. Throckmorton.

Before the United States Land Office, San Francisco, Cali-

fornia. In the matter of the application of Samuel R. Throckmorton, to purchase (under the Act of Congress entitled "An Act to Quiet Land Titles in California," approved July 23, 1866), a portion of sections 28 and 29 in township 1 north, range 6 west, Mount Diablo base and meridian, de-
64 scribed as lot 2 of section 28, containing 2.27 acres, lot 3 of section 28, containing 3.16 acres, a portion of the east half of the northeast quarter of section 29, containing 22.46 acres, lot 1 of section 29, containing 2.37 acres, lot 30, section 29, containing 43.10 acres, making a total of 73.86 acres.

Monday, February 7, 1881.

Present:

J. A. Robinson,
Representing Samuel R. Throckmorton;
James F. Stuart,
Representing Ebenezer Wormouth.

Mr. Stuart, on behalf of Ebenezer Wormouth, objects to any testimony taken in this matter under the Act of Congress entitled "An Act to Quiet Land Titles in California," approved July 23, 1866, upon the ground that the said act has been repealed as appears by the Revised Statutes of the United States.

Mr. Robinson, on behalf of applicant, offers in evidence application of S. R. Throckmorton in this matter on file in the United States Land Office at San Francisco.

Also summons issued December 15, 1880, signed by the Register and Receiver of the United States Land Office at San Francisco, addressed to Mrs. H. R. Cushing and E. Wormouth, together with an admission of service signed by each of the said parties, endorsed thereon, marked "Exhibit A."

Also, the entire Act of Congress of July 23, 1866, under which this proceeding is had.

Also, the original field notes of a survey of the land sought to be purchased by this applicant made by G. F. Allardt, Deputy United States Surveyor, marked "Exhibit B."

Also, a map accompanying the field notes exhibit B, marked Exhibit "C."

Also, a certified copy of the petition of Juan Reed to the Mexican Government for a grant of the Rancho Corte Madera del Presidio, marked "Exhibit D."

Also, certified copy of the grant and juridical posses-
65 sion of the Rancho Corte Madera del Presidio, marked "Exhibit E."

Also, certified copy of the decree of the Board of Land Commissioners in the case number 497, confirming to the heirs of Juan Reed the Rancho Corte Madera del Presidio, marked "Exhibit F."

Ex. G. Also, certified copy of the decree of confirmation by the United States District Court for the Northern District of California, in the case number 183, confirming to the heirs of Juan Reed the Rancho Corte Madera del Presidio, marked "Exhibit G."

Ex. H. Also, certified copy of deed from John J. Reed, Hilarita M. Reed, Thomas B. Deffenbach and Inez Deffenbach to James C. Bolton, dated August 12, 1865, recorded in book E of deeds, page 400, Marin County Records, marked "Exhibit H."

Ex. J. Also, certified copy of deed from James Clinton Bolton to Rudolph Steinbach, dated September 16, 1865, and recorded in book E of deeds, page 417, Marin County Records, marked "Exhibit J."

Ex. K. Also, certified copy of deed from Rudolph Steinbach to Emil Steinbach, dated March 28, 1866, and recorded in book E of deeds, page 569, Records of Marin County, marked "Exhibit K."

Ex. L. Also, certified copy of powers of attorney from Emil Steinbach to Rudolph Steinbach, dated February 18, 1864, recorded in book B of Powers of Attorney, page 163, Marin County Records, marked "Exhibit L."

Ex. M. Also, certified copy of deed from Emil Steinbach to Emil Grisar, dated June 16, 1866, recorded in book F of deeds, page 279, Records of Marin County, marked "Exhibit M."

Ex. N. Also, certified copy of deed from Emil Grisar to S. R. Throckmorton, dated June 19, 1866, recorded in book F of deeds, page 278, Marin County Records, marked "Exhibit N."

Ex. O. Also, certified copy of deed from James Clinton Bolton to Thomas B. Valentine, dated July 26, 1868, and recorded in book G of deeds, pages 116 and 117, Marin
66 County Records, marked "Exhibit O."

Ex. P. Also, certified copy of deed from John J. Reed to Hugh A. Boyle, dated May 11, 1869, recorded in book J of deeds, pages 9 and 10, Marin County Records, marked "Exhibit P."

Ex. Q. Also, certified copy of deed from Hilarita Reed to Hugh A. Boyle, dated May 24, 1869, recorded in book J of deeds, pages 11 and 12, Marin County Records, marked "Exhibit Q."

Ex. R. Also, certified copy of deed from Thomas B. Deffenbach and Inez Reed Deffenbach, Hugh A. Boyle, Maria Garcia de Boyle, Thomas B. Valentine and H. C. Newhall to Julius C. McCeney, dated February 1, 1871, recorded in liber J of deeds, pages 24-25, Marin County Records, marked "Exhibit R."

Ex. S. Also, certified copy of deed from Julius C. McCeney to Samuel R. Throckmorton, dated January 19, 1875, recorded in book I of deeds, pages 266-268, Records of Marin County, marked "Exhibit S."

Ex. T. Also, original plat and field notes of survey made by G. F. Allardt of the tract of land application to purchase which is now made, said survey having been made January 7, 1871, recorded February 6, 1871, in liber J of deeds, pages 30-32, Marin County Records, marked "Exhibit T."

Counsel for the applicant reserves the right to withdraw the said original plat and field notes, Exhibit T, by substituting in lieu thereof a certified copy.

Examination-in-Chief of Samuel R. Throckmorton. (Sworn on behalf of applicant.) By Mr. Robinson.

My name is Samuel R. Throckmorton, I am seventy-two years of age, my place of residence is San Francisco, California, and I am a land-holder. I have resided in California since June, 1850. I do know the land described by said map marked Exhibit "C." I have known it since 1855. The tract is enclosed.

Q. We will start with the line of fence along the creek designated upon said map as Arroyo Principal de Corte Madera del Presidio, and I will ask you when that fence
67 was built and by whom, if you know?

A. Commencing at Station 15 there has been a fence along there which could have been built within my knowledge since 1857,-and it antedates that, by common report. It is a post and rail fence. It has been built and rebuilt and replaced as it went out of repair from time to time, and it extended, as shown on the map Exhibit "C" until it joins the Corte Madera del Presidio creek running parallel with it, extending up to, I should say, as far as a point opposite the word "Arroyo" on the map. I reserve the right to correct this statement as to the termination of that fence upon reference to field notes which I have not now at hand. That far it was an ancient fence and has been standing there, to my knowledge, since 1857, when I first saw it, and it was frequently repaired after that time. It is in good condition now. It has been repaired frequently and a good deal of it rebuilt. Beyond that, extending

to the northwest corner where Baratra's house is, the fence was extended from this ancient fence in the winter of 1866-7. It was a substantial, first-class, post and rail fence when it was built. All of this western line of fence has been kept in repair, the first-mentioned part since 1857, and the part last mentioned since 1866-7, and some of it has been rebuilt in the best possible manner within the last three or four years, and is now in good order. Starting on the northwest corner of said map and running over to the point marked on the map, "Post A.", on top of of "grassy spur," there is a first-class fence built by me in the year 1872, I think. That line is intended to mark the northwestern line of the tract. I built the same kind of a fence at the same time from that post marked A. referred to, running over the line which runs north 70.¾ degrees west 10.70 chains. That lines marks the northeastern boundary. Upon the northeast corner of the tract is the point marked "Pest" at the end of the line referred to.

Q. Commencing at that post and running southerly to the point marked "Post in Stone Mound," is there a fence along that line?

A. There is a fence extending along that line to
68 within a few feet of the post last referred to, where the fencing of that line merges, for convenience, into a lane, enclosed by a gate. That fence was built by me at the same time as the fence last mentioned, and was a fence of the same character as the other. From the point where that fence strikes the lane it runs west along the fence of said lane to the gate and thence by a diagonal short fence to the southwest, until it intersects the boundary line of the tract on the south, running between the before mentioned in stone mound to the post marked on the map "Post C. M. P. 181." Thence there is a fence running south 2.45 chains, and thence there is a fence running northeasterly 40 links, and thence a fence running along the line marked on the map north 70.1-4 degrees east 3.90 chains to station 15, the point of commencement of the old fence first referred to in this description. I built the the other. It has been changed and altered a little and repaired to suit convenience in reference to the gate, I believe, once or twice. The entire tract is to-day enclosed by a substantial fence on these courses and distances about the time I finished fence, and has been ever since 1872, and every part has been fully enclosed; and the western line, as I said, has been enclosed from time immemorial, almost—that is, ever since I have known it, for the distance that I have described. I gain

access to the tract by going over in some part land that I am not in possession of. There are gates and bars that give access to it from three ways, and one gate from my own land and one set of bars over that which I possess in this tract.

Q. I will ask you if the fence on the west of the tract described is on the boundary of the Rancho Corte Madera
69 del Presidio, as granted by the Mexican Government to Juan Reed and confirmed to the heirs of Juan Reed?

A. No, it is not. The old fence referred to is on the northeastern line of land of which I have always been in possession and which is shown on the map marked "A long fence." The Rancho Corte Madera del Presidio is bounded by Corte Madera del Presidio Creek in the grant on the west. This tract is within the interior boundaries of the Corte Madera del Presidio grant. The Corte Madera del Presidio Creek comprises the western boundary at the place referred to. I do not possess all of the tract enclosed by the fence described. I am in possession of that which the map Exhibit C shows that I am in possession of. The lands within the inner lines of the tract shown on the map are in possession of Ebenezer Wermouth, and have been for many years. I have never been in possession of that portion of the land. Wermouth is in possession of 14 acres, consisting of two pieces, one containing 12.¾ acres and the other 1.¼ acres as described on the map within the inner lines with courses and distances. I claim this tract of land last referred to, now in possession of Wermouth, as part of the Rancho Corte Madera del Presidio by virtue of my deed. Wermouth has been in possession of part of that tract of land of 14 acres for many years, but my recollection does not serve me as to his occupation of the different pieces of it. I think he added to his possession at different times. I have used and improved the land enclosed within the exterior boundaries of the whole tract, as shown on the map Exhibit C, excepting the tract of 14 acres referred to, claimed by Wermouth. I have used and occupied all that part lying west of the westerly fence of this tract first spoken of, and described in my answer to Q. 7 in this deposition, since 1855; I have been in possession of the rest, as tenant in common with the Reeds and Bolton, since June 19, 1866; and I have improved and occupied it exclusively since 1872, the time of putting a fence around it, with improvements. I have used it for ranch purposes. It is being used now by my tenant John Baratra. On the 19th day
of June, 1866, I purchased this land from Rudolph
70 Steinbach by deed from Emil Grisar, in whom the

legal title then was, one undivided quarter of all of the Rancho Corte Madera del Presidio outside of the Matthewson survey, as described in the deed from the Reeds to Bolton. The consideration which I paid Steinbach was $1250.00, and $250.00 of his legal expenses, making $1500.00 in all which I paid for the one-quarter. I entered into possession with them as a tenant in common. I made that purchase pending a suit in ejectment brought by the Reed heirs, in the complaint filed in which case they claimed, as a part of the Rancho Corte Madera del Presidio, the land for which I now petition; and in their deed to Bolton, in which they made the title to the quarter which I purchased, they described it as a part of the Rancho Corte Madera del Presidio. They had partially tried their case and, I think, taken testimony, sustaining by their proofs the allegation that this land was within the exterior boundaries of the Rancho Corte Madera del Presidio. In that condition of assertion of ownership, by them, I purchased one-quarter of the Bolton interest before mentioned, the land outside of the Matthewson survey which included this tract in question. It was the case of James C. Bolton vs. John Van Reynegan et al., number 199 in the United States Circuit Court. In that suit a tenant of my own, living on the Saucelito Rancho had been made a party, whom I defended. In the course of events Bolton and Van Reynegan and the Reed heirs withdrew so much of their pretentions as included my tenant, which left, that is, the Reeds, Bolton and myself, as owners and tenants in common before named of the one-quarter of the Corte Madera del Presidio Rancho within its original described boundaries. Then they amended their complaint, and took judgment against such of the settlers as were on the parts of their land which they claimed to be within their own boundaries, which resulted in obtaining judgment in accordance with their amended complaint. Then on February 1st, 1871, the Reeds, Bolton and myself, owners of that interest, made amicable partition, setting apart my interest in it, the deed of
71 which was made to the name of one Julius C. McCeney, for the reason and purpose of avoiding confusion which might be produced by so many cross-conveyances as we were making at this time in clearing this matter up; but it was given to him and taken by him for my account, and the interest has since been conveyed by him to me by deed dated January 19th, 1875. At the time of the execution of the deed to McCeney for my use

I deeded to my co-owners and their representatives the balance of all the interest that I claimed under the deed from Grisar to me. The $1250.00, together with $250.00 attorney's fees, expressed in the deed from Grisar to me, is really the consideration which I paid for the land. I do not wish to make any further statement with reference to this chain of title. I do not think the Rancho Corte Madera del Presidio has ever been surveyed at all by the United States authorities as a rancho; I don't think there ever has been a legal survey made of the rancho. Dr. Matthewson surveyed a piece of it off in 1858, but I think the survey was set aside. This survey did not touch me anywhere. The next survey was made by Leander Ransom; it was not made by anybody, to tell the truth. These surveys were merely re-capitulations and illustrations of former surveys made by the State of California for other purposes. There never was a United States survey made around the land, except on one line, and that was the western line which, by some inscrutable accident, was confirmed by the Secretary of the Interior. The Rancho Corte Madera del Presidio has not been patented and there has been no re-survey made under the last orders of the Land Department, and notwithstanding that, a map of public land has been promulgated and put on file in the Land Office, and entries have been made under it, whilst there never has been a re-survey made; and it is in consequence of that irregularity that I make this application to save my rights.

Q. What is the western boundary of the Rancho Corte Madera del Presidio, as described in the grant, judicial
72 possession, decree of the Board of Land Commissioners, and decree of the United States District Court?

Obj. Mr. Stuart—We object to that as incompetent, because the records in relation to the matters are the only evidence that can be used; parole evidence cannot be brought in to vary or contradict or in any way alter the record proofs.

A. As described in the judicial possession the boundary on the west is a little brook now called the Arroyo Corte Madera del Presidio, and willow thickets and the little foothills running up to the mountain called the Palmos, and which western boundary extends northerly to the southerly boundary line of the Pueblo of San Rafael to another little brook called the Jolon and another Corte Madera, called Corte Madera del San Pablo, which northern boundary of necessity must carry the boundary line up to the head junction of the two creeks where they deflect from each other. I describe this western bound-

ary as being the entire length of the little brook, the willows and foothills, and so forth, because the western boundary must extend that far up or you could not meet the northern boundary. The northern boundary is the whole course of the Arroyo Jolon from where it heads at the head of the little brook, the western boundary, out to the Bay of San Francisco, and which northern boundary so described is more than a measured mile north of the northern boundary of the tract claimed by this applicant. The tract of land sought to be purchased by me in this proceeding is included within the exterior boundaries of the land granted to Juan Reed and conformed to his heirs; and the tract which I wish to purchase is included within the boundaries of the land granted by the Mexican Government to Juan Reed, named the Rancho Corte Madera del Presidio. I brought a suit of ejectment in the Seventh District Court, in and for Marin County, and which is still pending, against Wermouth to eject him from the piece of land in his possession included in the survey represented on the map Exhibit C. The record shows that Wermouth was one of the defendants dispossessed by the United States Marshal in the case of Bolton vs. Van Reynegan referred to.

73 I never heard, or even the suggestion of it, that the land sought to be purchased by me in this application contains any mines of gold, silver, copper or cinnabar.

Ex. U. Mr. Robinson, on behalf of applicant, offers in evidence certified copy of the complaint in the case of James C. Bolton vs. John Van Reynegan, in the United States Circuit Court for the District of California, number 190, marked "Exhibit U."

Ex. V. Also certified copy of the judgment in the said action, marked Exhibit V.

Ex. X. Also certified copy of the complaint in the case of Samuel R. Throckmorton vs. Ebenezer Wermouth, in the District Court of the Seventh Judicial District of the State of California, in and for the County of Marin, together with a certificate that the said suit is still pending, marked Exhibit X.

Ex. W. Also a certified copy of the writ of possession and return of the United States Marshal in the case of James C. Bolton vs. John Van Reynegan, marked Exhibit W.

Cross-examination of Samuel Throckmorton by Mr. Stuart. The writ of possession in the suit of Bolton vs. Van Reynegan under which these parties were dispossessed, did include a little of the land that Wermouth now claims, and that is in contest between him and me in this matter. He was dis-

possessed under that judgment of any of the land that he is now claiming in this proceeding. I don't think he was put out of all that he is now claiming; I don't know exactly the quantity of which he was dispossessed, because I was not there. My impresson is that the writ of possession dispossessed him of that portion of the land claimed by him that is included in the description in the amended complaint in that suit. I do not know whether the land claimed by him in this contest was the land that Wermouth was ejected from by the United States Marshal, the record will show. The land from which Wermouth was ejected in the suit referred to is a part and portion of the land purchased by me as I have stated, and apportioned or partitioned to me by my co-tenants, and I claim,
and assert title to it under that purchase, and in no
74 other way.

Upon reading the above deposition, the witness makes the following corrections:

I wish to correct my testimony by stating that the old fence referred to on the western boundary of the tract terminated near station 13, as delineated upon map Exhibit C.

I wish to add: That part of the land lying west of the old fence referred to is enclosed by the fence of my Rancho Saucelito, which adjoins this property.

S. R. THROCKMORTON.

Subscribed and sworn to before me, this 7th day of Feb'ry, 1881.

CHAS. H. CHAMBERLAIN,
Receiver.

Tuesday, April 5, 1881.

Case called on this day by agreement of counsel for S. R. Throckmorton and E. Wermouth, according to the stipulation on file herein. Present J. A. Robinson Esq., Counsel for Throckmorton, and E. Wermouth in person and by Counsel J. F. Stuart Esq.

Counsel for E. Wermouth objects to the taking of any testimony at this time, because the survey of the Rancho Corte Madera del Presidio is a pending case now before the Land Dept. of the Govt. and the survey and location of said ranch has never been finally made and therefore the Tp. Plat filed in this case upon which S. R. Throckmorton has acted in filing his claim, has been illegally filed and no legal right exists in said Throckmorton to prosecute this suit against Wermouth

until the said ranch shall have been finally surveyed and a patent issued on said survey, and until an official map of said township shall have been legally filed after the officiai survey of said ranch and the issuing of the patent therefor.

Counsel for S. R. Throckmorton replies that at a hearing duly had in this case on the 7th day of Feb'y, 1881, the testimony of S. R. Throckmorton the applicant was duly
75 taken, at which examination J. T. Stuart, Esq., Attorney for E. Wermouth, was present and cross-questioned said witness S. R. Throckmorton, and that a number of exhibits were introduced on behalf of S. R. Throckmorton.

Jacob Gardner called and sworn on behalf of S. R. Throckmorton, testifies as follows:

By Mr. Robinson.

My age is 35 years old, I reside on the Saucelito Rancho, Marin County, and am superintendent of said rancho. I know the land delineated by a brown line upon the map attached to the application of S. R. Throckmorton in this case as being part of Tp. 1 N., R. 6 W., M. D. M. I also know the tract shown upon said map and colored blue. The tract colored brown, with the exception of the tract colored blue, is in the possession of S. R. Throckmorton, since 1871 or 1872, I think 1871. The same is used for grazing by Mr. Borarta, who leases it from Mr. S. R. Throckmorton. It does not contain any mines of gold, silver, copper or cinnabar to my knowledge. It is enclosed with a board and picket fence built by Mr. S. R. Throckmorton, all but the blue line that was built before I came. I have known the fences on the line colored brown since 1871 or 1872. There was a fence on the line colored brown commencing at the N. W. corner of the tract included in the brown lines and running northeasterly about 400 feet, perhaps more. There was no other fencing along the north and east line colored brown. There was a fence commencing on the Arroyo Corte Madera del Presidio, southeast of the point marked on the map Wermouth's house and running along the line colored brown up to the N. W. corner. Mr. E. Wermouth, contestant herein, occupies the land included in the blue lines. He has been in possession since I have known the land.

Cross-examination of this witness waived by Mr. Stuart.

JACOB GARDNER.

Subscribed and sworn to before me this 5th day of April, 1881.

WM. R. WHEATON,
Register.

76

John Boratra called and sworn on behalf of S. R. Throckmorton testifies as follows:

By Mr. Robinson.

My age is 41 years old, I reside on the Saucelito Rancho, Marin County, and am a dairyman. I know the land shown upon said map by a line colored brown, attached to application of S. R. Throckmorton, but I do not understand the map thoroughly. I occupy the tract colored brown with the exception of the tract colored blue, as the tenant of Mr. Throckmorton. I have occupied the entire tract since it was fenced, I think in 1872, and a portion of it before that. The same was used for grazing purposes during all those years. As the tenant of S. R. Throckmorton, I went to live in that locality in the fall of 1866 to the best of my memory. The said tract is colored brown. There was a portion enclosed when I first went there where a fence along the creek, Arroyo Corte Madera del Presidio, commences just south of Wermouth's house and running up to the N. W. corner of the tract, up to lands now occupied by Mrs. Cushing, and from that N. W. corner there was a piece of fence extending easterly along the line for about 2.5 of the distance to the next corner east. There were no other fences on the north and east line when I went there, but the tract was all enclosed in 1872. The fence is a good 4-board fence on the north and east line and on the creek a portion is a picket and a portion post and rail, these fences on the north and east line were built by me for Mr.Throckmorton and I have kept the other fences in repair. This land does not contain any mines of gold, silver, copper or cinnabar; not that I know of.

Cross Exam. by Mr. Stuart. Jacob Gardner, the witness who preceded me, was Mr. Throckmorton's agent at the time the fence spoken of by you was built by me.

JOHN BORATRA.

Subscribed and sworn to before me this 5th day of April, 1886.

WM. R. WHEATON,

77 Register.

Continued--To be called on consent and by agreement of counsel. U. S. Land Office, San Francisco, Cal. In the matter of the application of Throckmorton to purchase portions of sections 28 and 29, T. 1 N., R. 6 W., M. D. M. Deposition of Allardt. Before the United States Land Office, San Francisco, California. In the matter of the application of

Samuel R. Throckmorton to purchase (under the Act of Congress entitled "An Act to Quiet Land Titles in California," approved July 23, 1866) a portion of sections 28 and 29, in township 1 north, range 6 west, Mount Diablo Base and Meridian, described as lot 2 of section 28, containing 2.27 acres, lot 3 of section 28, containing 3.16 acres, a portion of the east half of the northeast quarter of section 29, containing 22.46 acres, lot 1 of section 29, containing 2.87 acres, lot 3 of section 29, containing 43.10 acres, making a total of 73.86 acres.

Wednesday, May 25, 1881.

Present, J. A. Robinson Esq., Counsel on behalf of Applicant; S. R. Throckmorton, the Applicant, in propria persona; J. F. Stuart Esq., Counsel for E. Wormouth.

Examination-in-Chief of G. F. Allardt (a witness on behalf of the applicant): By Mr. Robinson.

My name is G. F. Allardt, my age is 48 years, I reside in Oakland, and am a civil engineer and surveyor. I am a Deputy United States Surveyor and was Chief Engineer of the State Tide Land Survey from 1868 to 1873. I have had the experience of the last 23 years in surveying Spanish grants. I assisted in the survey of the Rancho Corte Madera del Presidio confirmed to Juan Reed. That is to say, the first survey; the Matthewson survey. I was principal assistant to R. C. Matthewson, Deputy United States Surveyor, who made a survey of the said rancho under instructions in 1858. I had charge of the party and run all the lines in the field.

Q. Mr. Throckmorton—Did you ascertain and run a
78 western boundary of that rancho at that time.

A. There was a trial line run on the west, but I don't know whether it was intended to be a boundary or not. I don't think it was returned to the office.

Q. Was it not intended to cut off a given quantity?

Obj. Mr. Stuart—We object to that upon the ground that the official field notes of the survey which the witness himself says he run of all the lines of the survey referred to are the best evidence and the only legal evidence that can be resorted to at this late day to ascertain what were the lines of that official survey, and said field notes cannot be contradicted by parole testimony or the recollections of the witness at this time.

A. My recollection is that it was merely a line of recon-

noisance; a line cutting off a given quantity is shown on the official map. This survey was returned to the Surveyor-General's Office in due form with the field notes and a map. I knew Leander Ransom during his lifetime. He held the position of United States Deputy Surveyor. He was instructed to make a survey of the western boundary of the Rancho Corte Madera del Presidio, but I am quite certain he never ran the line on the ground. I am familiar with the terms of the grant of the Rancho Corte Madera del Presidio to Juan Reed as made by the Mexican Government.

Q. What constitutes the boundary of said grant on the west?

Obj. Mr. Stuart—We object to that on the ground that we are not dealing with said grant but with the final decree of confirmation of said rancho; that the grant, judicial measurement and all the original papers are merged in the final decree of confirmation, and the boundaries of said rancho as judicially determined by the United States Courts are to be determind by that decree and not by the original grant.

A. I would like to refresh my memory by looking at the description. I don't recollect the exact words. (Refers to map.) The boundary of that grant on the west is the Arroyo Corte Madera del Presidio.

79 Obj. Mr. Stuart—I move to strike out the answer because it is not a correct answer to the question. It does not give the boundaries of the grant but merely an arroyo, which the witness seems to have located on a map which lies before him.

Ex. Y. Mr. Robinson—In reply I will put in evidence the map referred to in Mr. Stuart's objection, being a certified copy of a map accompanying the objections of S. R. Throckmorton to the survey of the Ranch Corte Madera del Presidio, heretofore marked Exhibit S. R. T. No. 6, and now to be marked in this proceeding "Exhibit Y."

Obj. Mr. Stuart—I move to strike out said map as evidence in this case, as no foundation has been laid for the introduction of said map.

Mr. Robinson—What constitutes the boundary of said grant on the north?

A. The Arroyo Corte Madera de San Pablo, or Arroyo Holon and San Francisco Bay.

Obj. Mr. Stuart—I move to strike out the answer as being incorrect and not in accordance with the grant as found in the title papers.

Q. Mr. Robinson—Is that also the southern boundary of the Pueblo of San Rafael?

Obj. Mr. Stuart—Objected to on the ground that no grant of the Pueblo of San Rafael has ever been presented or confirmed.

A. According to a description in some of the papers, the Pueblo of San Rafael is made the northern boundary of this rancho, which, I think, is the Arroyo Holon. I made for S. R. Throckmorton a survey of the tract of land colored yellow upon the map Exhibit Y before you marked "Tract of Land Owned and Referred to in the Objections by S. R. Throckmorton." I made the survey on the ground and followed the bounds and fences pointed out at the time by Mr. Throckmorton. It is a long time ago. If I had my field notes I could tell more about it. I can't remember all these things. This map Exhibit Y shows a survey of an enclosed tract of 80 land made at that time and claimed by Mr. Throckmorton. The character of the land between the Rancho Corte Madera del Presidio on the west and the western boundary of the Matthewson survey as established and surveyed by Matthewson is mostly hilly, the western portion being brushy, partly covered with underbrush and timber, precipitous. I made a survey of the public land in township 1 north, range 6 west, M. D. M., lying east of the Arroyo Corte Madera del Presidio. I had the line returned by Deputy Ransom as the western boundary of the Rancho Corte Madera del Presidio for the eastern boundary of that public land survey. As I stated, that line was run in the field. Whether or not it was established, I can't say. I ran the line in 1858 as a trial line. I ran it since to test the correctness of Ransom's measurements and the enclosure of his official notes. I am not aware that Leander Ransom made any survey in the field pertaining or relating to the western boundary of the Rancho Corte Madera del Presidio. I think not. I am very positive on that point, that he made no survey in the field, because I furnished him all the field notes that he returned. The Ransom survey was a compilation of State and private survey. The portion of that survey which was made by the State was all of the meanders of the bay and of the marshes. Leander Ransom returned two sets of field notes of the Rancho Corte Madera del Presidio, one of which included the salt marshes and the other excluded them. At the time I subdivided fractional township 1 north 6 west, I did not find any stakes or monuments on the

line Ransom returned as the west boundary of the Rancho Corte Madera del Presidio.

Q. From your knowledge of the location and survey of Spanish ranchos and from the original title papers in the case of the Corte Madera del Presidio Rancho, it is possible that there could be any public land east of the Arroyo Corte Madera del Presidio and south of the Holon?

Obj. Mr. Stuart—That is objected to because the decree of confirmation of said rancho is the only evidence that can be resorted to to answer a question of that kind, and this
81 witness is wholly incompetent to answer it, because he is not able to give here, in the first place, the original boundary of the grant. The question is wholly illegal.

A. I have stated that in my opinion those two arroyos form the exterior boundaries of the grant. That being the case, there can be no public land lying east or south of the said arroyos.

Obj. Mr. Stuart—I move to strike out the answer as being wholly incompetent, as the opinion can not be resorted to to prove boundaries in opposition to the final decree of confirmation.

Q. Mr. Robinson—If you were deputized by the United States Surveyor General to survey the Rancho Corte Madera del Presidio, with the papers of the case before you, where would you establish the western boundary?

Obj. Mr. Stuart—We object to that as wholly improper.

A. Before I could answer that question I would have to study over the papers to know what papers are before me. From papers that have been presented to me and from my knowledge of the land, I should make the arroyo Corte Madera del Presidio the western boundary of the rancho.

Q. Would that survey include the tract in controversy and marked on the map Exhibit Y, "Tract of land owned and referred to in the objections by S. R. Throckmorton?"

A. It would wholly include it.

Q. How far north would you follow the arroyo Corte Madera del Presidio?

A. To the point marked 3 on the said map, being near the source of the arroyo Holon.

Q. What natural landmark shown upon said map marks the northern boundary of said "grant?"

A. The Arroyo Holon in its entire course, and San Francisco Bay.

Q. What do the points marked "P" and "Q" on the map Exhibit Y designate or show?

A. They represent a line running from an old sawmill to the main bend of the Arroyo Holon. I do not know
82 whether that is the line referred to in the suit of ejectment brought by James C. Bolton against L. Van Reynegan in the United States Circuit Court. I compiled this map Exhibit, and that line P. Q. is taken from another map marked "Exhibit No. 2 to Tracy's deposition," being entitled "A map of the Rancho Corte Madera del Presidio according to the original diseno and juridical measurements, granted to Juan Reed, by C. C. Tracy, surveyor."

Ex. Z. Mr. Robinson—I now put in evidence the map referred to in the last answer of the witness, being a copy certified by the United States Surveyor General for California. (Marked "Exhibit Z.")

Obj. Mr. Stuart—I object to both the original and certified copy of said map, because said map is a map of a private survey made for private parties for speculative purposes and never had any official character to it, never was adopted by the United States in any way, shape or manner or recognized by the authorities in any way, shape or manner.

Mr. Robinson—In reply I will state that the said map is a certified copy of the map on file in the United States Circuit Court for the District of California introduced in the case of Bolton vs. Van Reynegan, and the line marked "Juridical possession" commencing at the old sawmill and running north 20 degrees east 162.605 chains.

Mr. Throckmorton—That line marked "Juridical possession" is the western boundary line described in the original complaint in said suit, and proved up by every one connected with said juridical possession, proved up by Bolton in said suit and is the only boundary line that has ever been proved by any witness for anybody on any one's account to the present day.

Obj. Mr. Stuart—I move to strike out the statement of Mr. Throckmorton as an attempt to give evidence in this case in an indirect way, by bare, naked statements without any proof; and I move to strike out the whole of it. Furthermore I object to this map, on the ground that it is not an official map, that it is a map of a private survey made for the speculative
83 object which has been proceeded with before the United States Court and before the executive department of

the Government for eight or ten years, and was gotten up with other papers for the purpose of making a grant of one league cover about two leagues or more of land; and furthermore, because the western boundary attempted to be proved by the said map is not named in the grant nor the juridical measurement nor the decree of confirmation of the United States District Court.

Mr. Robinson—In reply I will state that so far as the speculation is concerned, I have had nothing to do with it. All that I seek is to perfect the title to the tract shown upon said map, containing about 80 acres, which is the land involved in this controversy. This line shown on this map, Exhibit Z, takes in and includes the tract of land of S. R. Throckmorton, now in controversy.

Cross-examination of G. F. Allardt by Mr. Stuart.

The boundaries of the Rancho Corte Madera del Presidio are the Arroyo Corte Madera del Presidio on the west, the Arroyo Holon or Arroyo Corte Madera de San Pablo, and the Bay of San Francisco on the north. I don't think the name of Corte Madera del Presidio for the arroyo is used in the grant of the Corte Madera del Presidio Rancho, but the location of the creek is so described that it can be identified as being without doubt the Arroyo Corte Madera del Presidio. I think an arroyo is named in the grant as passing a place called Las Animas, and that is this Arroyo Corte Madera del Presidio. In order to be positive that an arroyo is mentioned in the grant, I must have the grant before me. My statements in regard to this matter are made from my own knowledge derived from the papers relating to this grant. I can't specify whether the words are in the grant or in other papers relating to the rancho. I think in the field notes of the juridical survey under the Mexican Government it fixes the Arroyo Corte Madera del Presidio as the western boundary. The juridical measurement commences at a point on said arroyo and runs from that point northerly, which describes the arroyo as a bound-

84 ary of said grant and identifies. I testify from recollection; I feel pretty positive on that point. I have seen the diseno or a description, I don't remember which, of the boundaries of San Rafael as they were originally established by the Mexican Government, in which the southern boundary of the Pueblo of San Rafael was designated as the Arroyo Holon, and that would make it the Reed Rancho or the said Rancho Corte Madera del Presidio on the north. I know nothing about surveys of the lands of San Rafael made by the

Mexican Government on the first day of October, 1834, defining boundaries, nothing further than what I have stated. I have never seen the boundaries of San Rafael as established by the Mexican Government and found by the map and field notes of the survey of said lands made by the said government on October 1st, 1834.

G. F. ALLARDT.

Subscribed and sworn to before me this 25th day of May, 1881.

CHAS. H. CHAMBERLAIN,
Receiver.

Law Office T. A. Robinson, 509 Montgomery street, rooms 3 and 4. San Francisco, Cal., 188

Stipulation.

Before the U. S. Land Office,

San Francisco, Cal.

January 23rd, 1882.

E. Wermouth.
vs.
S. R. Throckmorton } (T. 1 N., R. 6 W., M. D. M.)

It is stipulated and agreed that the further taking of testimony in the above entitled case may stand continued, to be resumed at any time upon notice of five (5) days to be served by the party desiring to call up the case, or by consent of both parties without said notice.

85

J. A. ROBINSON,
Attorney for S. R. Throckmorton.
JAMES F. STUART,
Attorney for E. Wormouth.

Department of the Interior,
United States Land Office.
San Francisco, Cal., Mar. 14, 1883.

S. R. Throckmorton
vs.
E. Wermouth,
H. R. Cushing. } Sections 28 and 29, T. 1 N., R. 6 W.

In this cause Mrs. Cushing was never brought into Court,

and has always and still does, refuse to voluntarily become a party to the above entitled action. On Jan'y 22, 1883, she caused citation to issue against said Throckmorton, to show cause why she should not be allowed to enter. In response to said citation, J. A. Robinson appeared this day and waived all contest with Mrs. Cushing. This case will now proceed as Throckmorton vs. Wermouth; Wermouth being a voluntary party to this contest.

WM. R. WHEATON,
Register.
CHAS. H. CHAMBERLAIN,
Receiver.
U. S. LAND OFFICE,
San Francisco, Cal'a.

Throckmorton
vs.
Wermouth.

Stipulation that the above case now pending in the U. S. Land Office will be resumed on the 12th day of May, 1885, at 10 o'clock a. m.

JAMES F. STUART,
Att'y for Wermouth.
J. A. ROBINSON,
Att'y S. R. Throckmorton Estate.
U. S. Land Office,
San Francisco, May 12th, 1885.

Throckmorton — J. A. Robinson Esq., Att'y.
vs.
Wermouth. — Jas. F. Stuart Esq., Att'y.

Case called this day pursuant to stipulation of counsel for both parties. Present all parties in interest.

Homestead Proof--Testimony of Claimant.

Ebenezer Wormouth being called as a witness in his own behalf in support of homestead entry No. 4415 for lot 3 of section 28 and lot 3, section 29, township 1 N., R. 66 W., M. D. M., testifies as follows:

My name is Ebenezer Wormouth. I am 62 years of age and my postoffice address is Saucelito, Marin County, Cal. I am a native-born citizen of the U. S., born in New York. I built my house on the land about 5 years ago in the fall of 1880. I went

to live there right after that. The house is 16x10 feet, a barn 26x16 feet, 2 sheds, one 36 by 14 feet and the other 16x15 feet. I fenced in 10 or 12 acres. I value my improvements at about $700.00 or $800.00. I have spent $500.00 or $600.00 in clearing and grubbing the land. My family consists of myself and wife. For the first two years I lived there continuously after that; we would live part of the time in that house and part of the time across the line in another house. I have never been absent from the homestead since making settlement. I used the land continuously all the time. Of late years I have not cultivated any of the land; only pastured it. There are not to my knowledge any indications of coal, salines or minerals of any kind on the land. I have never made any other homestead entry. I have never sold, conveyed or mortgaged any portion of the land.

E. WORMOUTH.

87 I hereby certify that the foregoing testimony was read to the claimant before being subscribed and was sworn to before me this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN.

Continuance of direct testimony of Ebenezer Wormouth by Mr. Stuart.

I have had possession of this land included in my homestead ever since March 5th, 1859, when I first settled there.

Q. State—Examine Map Ex. "C" Thockmorton and point out on said map the location of your house when you first settled there in March, 1859.

A. Witness points to the spot marked Wermouth's house on the map—the east of the grant line. That was my first house. The land I occupied in connection with that house from 1859 until I built my new house was a tract that I had in possession in 1859, and the same that I am in possession of now. When I lived in this first house in 1859, I supposed that I had erected my house on public lands of the U. S. The first house that I lived in in 1859 was about 35 feet south of the house marked on Ex. "C." This house was burnt down and in 1862 I built the house marked Wormouth's house on Ex. "C." When I lived in those houses previous to erecting my 3rd house, I supposed I was on public lands of the United States. I cultivated a portion of it for 8 or 10 years, more or less, between the time I settled in 1859 and the time I entered the land as a homestead. When I ascertained that my second house was claimed as being within the exterior bounds of the Mexican Grant, Rancho Corte Madera del Presidio, I built an-

other house outside on what I knew to be and what is now public land.

Objected to as being Mr. Stuart's testimony and not the witness', the witness having testified to having built his house on land which is now public land.

Question repeated. I built another one further on in what is public land now, was so laid down. I built the 3rd house on public land because in case there might be a change again I could have a house on the other side, too; I did not want to abandon my rights on the other side, if I had any, until the thing should be finally settled. When I say "by the
88 thing being finally settled," I mean the title to the ranch, to see whether there would be any changes in the surveys. It was my intention, in case the line of survey was changed, to endeavor to secure the land on which my second house was. When I was absent from my third house, erected by me on what is now public land, as stated by me, my wife and I resided in the second house. I was not absent from my third house since I settled for the period of six months constantly, when we were, we were in the second house.

Counsel for Wormouth now asks to have the records of this office considered in this case, as showing his early settlement as a pre-emptor on the land claimed by him and the filing of his D. S. September 14, 1880—No. 15,517—settled March 5, 1859.

As per map Ex. "C" Throckmorton that part of the fence along the creek was built by parties under whom I claim and bought out their improvements and the balance I built. When I built my last house, Throckmorton had a fence so as to enclose my fence and houses, but my barn, fence and my other houses were there long before he built any fence. This notice dated Oct. 1, 1872. I left a copy of it in Throckmorton's office and the other one dated Mar. 29th, 1877, when he built some more fence around there; I served a copy of it on him through his agent that was in charge of the ranch, Mr. Chas. Severance. [Counsel for Wormouth now offers these notices in evidence to be marked Ex. "A" Wormouth and Ex. "B" Wormouth. Counsel for Throckmorton now objects on the ground of these notices not identifying any land in this controversy.] These notices which I left at Throckmorton's office and served on his agent, as testified by me written and served, was in reference to the lands fenced in by Throckmorton so as to enclose the land claimed by me as marked on Ex. "C" Wormouth.

Counsel for Wormouth now offers in evidence an agreement between John J. Reed, Hilaria M. Reed, Thos. B. Deffebach and Ines Deffebach, his wife, and James Clinton Bolton, dated the 12th day of August, 1865, to be marked Ex. "C" Wor-
89 mouth.

Cross-examination by Mr. Robinson.

I came to California in September 6th, 1849. I settled in Marin County on the 7th day of January, 1850, and went to keeping house in 1859 right on the lands that I now occupy and occupied them ever since. I was not put out of possession by U. S. Marshal on Oct. 10, 1871, in the case of Bolton vs. Van Reynegan, Wormouth, et als. I was one of the defendants in that suit.

Q. Did not the U. S. Marshal call on you at that time?

A. Some man came there at that time and Mr. Hugh Boyle was with him; they said they claimed all that land south and east of me, but they did not want to remove me, nor did they remove me. I do not know the name of the U. S. Marshal. It was at the time the other settlers were put out, some man came there with Hugh Boyle; I don't know whether he was a U. S. Marshal or not. The other settlers were Commins, Louis De Nois and, I suppose, all the other defendants in that suit. I think it was the suit of James Clinton Bolton vs. John L. Van Reynegan, et al. I was one of the defendants in that suit. I suppose judgment was taken against me. I was not in Court, but I suppose there was something of that kind; am not positive.

Q. Ex. "W" Throckmorton is a certified copy of a writ of restitution issued in the case of Bolton vs. Van Reynegan et al. attached to it is the U. S. Marshal's return, in which he states that he served the same on the defendants, including Edward Wormouth, on Oct. 10, 1871. Question withdrawn.

I changed from a pre-emption to a homestead so as to have my time date back to the time I first settled there and to save my rights on the land. The first house I bought, and it is now burnt. I bought it from Saml. Warren, on the 3rd or 4th of March, 1889, and I took possession on the 5th of March, 1889. He sold me all the improvements, that is, chickens and everything he had—hay, furniture, house, fences and right and title to the place. The fence was built along the creek at that time. Throckmorton built the fence enclosing me at the time
90 served these notices on him. His heir is at present in possession of the land between my fence and his fences. They use it for grazing; they also plowed up a part of it and

raised some hay. At the time I built the house marked "Wermouth's" in Ex. "C" I was not notified by Throckmorton that he claimed the land; that house was my second house, and I built that either in 1862 or 1863, after the first one was burned down, and when the land was considered public land. I built the house I live in now, I think, about 5 years ago, in the fall, about September or October. I was not forbidden by Mr. Throckmorton to build at that time. He did institute a suit against me for that little corner inside of the Grant line. I do not know what became of that suit; he died, his counsel died and my counsel went off.

E. WORMOUTH.

Subscribed and sworn to before me this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

Homestead Proof—Testimony of Witnesses.

James Commins, being called as a witness in support of the homestead entry of Ebenezer Wormouth for lot 3 of section 28, lot 3 of section 29, T. 1 N., R. 6 W., M. D. M., testifies as follows:

I am a farmer and reside at Saucelito, Marin County, Cal. I have known Ebenezer Wormouth, the claimant in this case, for over 25 years. Claimant was qualified to make an entry of homestead. He is a native-born citizen of the U. S., over 21 years of age. I think he was married and never made a former entry of homestead to my knowledge. I don't know when claimant settled upon the homestead. Four or five years ago he went to live there, right after putting up the house 4 or 5 years ago. He has a small house 20x12 feet; fine barn 30x20 feet; 2 large sheds, a field fenced in. Total value about $500.00, $600.00 or $700.00. I do not know whether they resided there continuously; I have seen him there many a time.

I do not think he has been absent at all. I do not know
91 of his being absent. He used the land for pasture only these last 4 or 5 years. I do not think there are any indications of coal, salines or minerals of any kind on the homestead. I don't think the claimant has mortgaged, sold, or contracted to sell any portion of said homestead. I am not interested in this claim, and I think he has acted in good faith.

JAMES COMMINS.

I hereby certify that the witness is a person of respectability; that the foregoing testimony was read to him before being sub-

scribed, and was sworn to before me this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

Continuation of direct testimony of James Commins. By Mr. Stuart.

I have lived in the vicinity of these lands since 1859. Wormouth lived there before me. I do not know how long. I knew him to live in both houses. The one marked on Ex. "C" and in the other house south of this one, which was burnt down since 1859. He has lived in one or the other of those two houses, as also the one erected by him on what is public land now, since 1859. He has never been out of there.

Cross-examination by Mr. Robinson.

I have resided in Saucelito about 25 years since 1859. I lived on the Reed Ranch in Saucelito township. My house is east of Wormouth's house. I do not now own the land upon which I reside. I am nobody's tenant. I have resided in California since 1852. I lived in Tomales, the north end of the county, before I went to live on the Reed Ranch. I was raising stock up there. I left there in 1859; I had rented the Reed Ranch for stock. I first became acquainted with Wormouth where he lives or thereabouts. I found him there after I had leased the ranch. I do not know whether I told him I had leased the ranch or not. I do not think I did. By the Reed Ranch, which I had leased, I mean the Rancho Corte Madera del Presidio. My lease was in writing. I haven't it with me. It is on record. I do not know whether Mr. Wormouth was
living on the Reed Ranch as it then existed or was
92 known; they did not claim up there as the Reed Ranch
then. I kept my stock all over the ranch. There was no fence dividing the Reed Ranch from the Saucelito Ranch in 1859. Some of my cattle ranged all over Saucelito Ranch.

JAMES COMMINS.

Subscribed and sworn to before me, this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

Recess till 1 p. m.

Homestead Proof—Testimony of Witness.

Peter Gardner, being called as witness in support of the homestead entry of Ebenezer Wormouth for lots 3, Sec. 28, lot 29, T. 1 N., R. 6 W., M. D. M.:

I am a farmer and reside in Marin County, California. I am well acquainted with Ebenezer Wormouth, the claimant in

this case, ever since he made his homestead entry No. 4415. Claimant was qualified to make such entry; he was over 21 years of age, a native-born citizen of the U. S., was a married man with a wife and never made a former entry of homestead to my knowledge. Claimant settled upon the homestead prior to 1860; he went to reside there prior to 1860. He has a house 20x12 feet, a barn 30x20 feet, chicken houses, sheds, some fencings. Total value about $500.00. Claimant and family have resided continuously on the homestead; I think so; I have been away for about two years; he was living there when I went away, and I found him there when I returned. I do not know of him as being absent for any period from said land since making settlement. There is about 5 or 6 acres of the homestead cultivated; he raised a crop for several years, then grubbed 5 or 6 acres and raised a crop on that, and used it since for pasture. There is not any indications of coal, salines or minerals of any kinds on the homestead that I know of. I do not know whether claimant mortgaged, sold or contracted to sell any portion of homestead. I am not interested in this claim, and I think he has acted in good faith.

PETER GARDNER.

93 I hereby certify that the witness is a person of respectability; that the foregoing testimony was read to him before being subscribed, and was sworn to before me this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

Continuation of direct testimony of Peter Gardner by Mr. Stuart.

Q. Please examine map Ex. "C" Throckmorton, and find out about where, if you can, Wormouth's first, second and third house were and are located thereon, if you know of any such house having been erected and now being on the land.

A. The one shown on this map is the second house. The first was burnt down. It stood a few feet south of this one. The third one is not shown on this map. The third house is about 100 to 150 feet northwesterly from the second house—across the yellow line shown on this map (grant line). The line indicated is the enclosure of Wormouth marked "along fence." I know the barn within that enclosure marked "barn"; it is Wormouth's. The line now marked as the western boundary line of the Rancho Corte Madera was not run when Wormouth built his first two houses. The land at the

time, and upon which these two houses were built, was considered public land.

Cross-examination by Mr. J. A. Robinson.

Q. You were asked "what would this line indicate?" You answered: It is the enclosure of Wormouth marked "along fence." Is not this tract within the limits of the land claimed by the applicant, S. R. Throckmorton, as shown upon Ex. "C"?

A. It is. This line (pointing on diagram to line marked "along fence") is Wormouth's; and this, following the black line to the east of the yellow line from north to south and thence running west and northwest represented by the yellow line and thence along the black line from west to post A and thence to post on N. E. corner, represents the claim of S. R. Throckmorton.

Q. Were the houses 2 and 3 erected within the Throckmorton enclosure by Wormouth?

A. No; within Wormouth's enclosure. But Wormouth's enclosure is within Throckmorton's enclosure.

Counsel for Wormouth objects to the question, as it don't state to the witness whether they were erected inside of Throckmorton's enclosure, as it is, or before Throckmorton's enclosure was made.

At the time these houses were erected Throckmorton had no enclosure there. I don't know when Wormouth built the fence. It was there prior to 1856. I don't know who built it. Wormouth occupied it since 1860. I never saw him build any fences there. For several years he raised grain there and cut it for hay. I think the yellow line on Ex. "C," marked western boundary line, shows the patent line of the western boundary of the Rancho Corte Madera as established. I know that Wormouth's house is on public land because it lies west of the patented line of the grant marked as public land on the public surveys.

PETER GARDNER.

Subscribed and sworn to before me, this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

It is now stipulated by the counsel hereto:

1st. That the U. S. patent for the Rancho Corte Madera del Presidio, confirmed to Juan Reed, has been issued and the lines thereof established.

2nd. That the public land in township 1 north, range 6 west, M. D. M., has been surveyed and the approved township

plat thereof is now on file in the U. S. Land Office of this City.

3rd. That the testimony heretofore taken in this case shall be considered as taken regularly and without objection as to dates.

San Francisco, May 12th, 1885.

J. A. ROBINSON,

94 Att'y for S. R. Throckmorton.

JAMES F. STUART.

May 19, 1885.

Case called pursuant to adjournment.

Present all parties in interest.

Counsel for Wormouth asks to have the various maps filed in this U. S. Land Office of township in which these lands lie (1 N., 6 W., M. D. M.) considered in deciding this case, also the entries upon the tract book in reference to the lands in contest, with reference to letters of Hon. Commissioner in reference thereto.

Adjourned till Friday, May 22, 1885, at 2 p. m.

Friday, May 22, 1885.

Case called pursuant to adjournment.

Present, all parties in interest.

Case closed forty days for Mr. Robinson to file brief and thirty days allowed Mr. Stuart to reply.

May 22nd, 1885.

San Francisco, Oct. 1st, 1872.

To Samuel R. Throckmorton and J. C. McCeney.

Sirs: You will hereby take notice that the lands you are now fencing, between my house and Mrs. King's, in Marin County, Sauciletto Township, are owned and claimed by *me*.

EBENEZER WORMOUTH.

Ex. "A" Wormouth.

Saucelito, March 29, 1877.

To Samuel R. Throckmorton.

Att'y for E. Wormouth.

Sir: You will hereby take notice that the lands you are now fencing on the northeast side of the crick leading up towards Dr. Cushens in Marin County I now owne and claim under pre-emption.

E. WORMOUTH.

Ex. "B" Wormouth.

(Endorsed:) To Samuel R. Throckmorton.

95

Copy of notice.

Ex. "C" Wormouth.

25 Cents in U. S. Inter. Rev. St'p.

Whereas, John J. Reed, Hilarita M. Reed, Thomas B. Deffebach and Ines Deffebach, his wife, have this day executed and delivered to me a deed of the undivided *one-half* part of all of the Rancho "Corte Madera del Presidio," situate in the County of Marin, in the State of California, *which is not included* in the survey of the said rancho which was made under instructions from the U. S. Surveyor General for the State of California, by R. C. Mattthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor General for California, September 19th, 1859, said approved survey containing four thousand four hundred and sixty 24-100 (4,460.24) acres of land; the said rancho being the same which was granted to Juan Reed by the Mexican Government. Now, therefore, in consideration of the execution and delivery of said deed, I hereby agree with them to give my professional services before the Courts of the United States and the proper authorities at Washington, and to use my best endeavors to procure a patent for them from the United States Government of the said rancho, without any expense or charge whatever to them excepting the expense of a new survey of said land (which they, themselves are to pay), and in case I shall fail to *obtain* a patent for more than is included in the above mentioned approved survey, then I shall procure for them, free of all charges, a patent for the land included in the said approved survey.

In witness whereof, I have hereunto set my hand and seal, at the City of San Francisco, this twelfth day of August, A. D. eighteen hundred and sixty-five.

[Seal.] JAS. CLINTON BOLTON.

In presence of

ATKINSON HOLCOMBE.

96

State of California,

City and County of San Francisco—ss.

On this twelfth day of August, A. D. one thousand eight hundred and sixty-five, before me, H. S. Homans, a Notary Public in and for said City and County, duly commissioned and sworn, personally appeared the within named James Clinton

Bolton, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the individual described in and who executed the said annexed instrument, and he acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in said City and County the day and year last above written.

H. S. HOMANS,

[L. S.] Notary Public.

Recorded October 6th, 1871, at 9 o'clock a. m., at the request of T. B. Deffebach.

State of California,

County of Marin—ss.

I, Geo. W. Davis, County Recorder in and for said county, do hereby certify the annexed to be a true, full and correct copy of the original record of an instrument as the same is recorded in my office in Book "K" of deeds, at page 43.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 16th day of May, A. D. 1881.

GEO. W. DAVIS,

[Seal.] Recorder.

By .....

Deputy Recorder.

97

EXHIBIT "B."

Field notes of a tract of land in Marin County, California, surveyed January 7th, 1871, for S. R. Throckmorton, by G. F. Allardt.

Beginning at a post marked "C. M. P. 181," distant 20 chains north of corner to Secs. 28, 29, 32 and 33, T. 1 N., R. 6 W., Mount Diablo Meridian, from which post a madrona tree 4 feet in diam. marked B. T.-C. M. P. 181. bears S. 24 E. distant 87 links; thence according to the true meridian the magnetic variation being 16 degrees 20 minutes east along the western boundary line of the Rancho "Corte Madera del Presidio," known as the "Ransom survey line"; N. 9 E. 20.45 chains to its intersection with S. R. Throckmorton's claim; thence along said claim N. 9 W. 9.50 chains to a post in stone mound; No. 70.¾ W. 10.70 chs. to a post marked A on top of a grassy spur, and descd.; S. 73.¾ W. 16.65 chains to the center of the Arroyo Principal del Corte Madera del Presidio, the northeasterly

boundary line of the Rancho "Saucelito" from which a redwood stump 27 inches in diam., marked W., bears N. 73.¾ E. distant 15 links; thence down the center of said Arroyo, being the northeasterly boundary line of the Rancho "Saucelito," as follows: S. 39.¾ E. 1.50 chains to Sta., S. 4½ E. 10.74 chains to Sta. S. 35 E. 10.30 chains to Sta. (at 5 chs. the west fork of said Arroyo joins from the west); S. 71.¼ E. 10.78 chains to Sta. N. 70.¼ E. 3.90 chains to Sta. S. 33.¾ E. 40 links to Sta. on line between Secs. 28 and 29 of said township, distant 17.55 chains north of corner to Sections 28, 29, 32 and 33; thence leaving the boundary line of the Rancho "Saucelito" and along section line; north 2.45 chains to the beginning.

Containing an area of 73.86 acres, viz: In lot 2, Sec. 28, 2.27 acres; in lot 3, Sec. 28, 3.16 acres; in E. ½ of N. E. ¼ of Sec. 29, 22.46 acres; in lot 1, Sec. 29, 2.87 acres; in lot 3, Sec. 29, 43.10 acres. Total as above 73.86 acres. Land mostly hilly, except a narrow strip along the arroyo.

[Map.]—See original transcript.

FINAL OATH OF DEPUTY SURVEYOR.

I, G. F. Allardt, Deputy Surveyor, do solemnly swear that I have well, faithfully and truly, in my own proper person and in strict conformity with the instructions furnished by the Surveyor General, the Surveying Manual and the laws of
98 the United States, surveyed a tract of land in sections 28 and 29, T. 1 N., R. 6 W., Mount Diablo Meridian, is represented in the foregoing field notes as having been surveyed under my directions; and I do further solemnly swear that all the corners of said surveys have been established and perpetuated in strict accordance with the Surveying Manual and printed instructions, and that the foregoing are the true and original field notes of such survey.

G. F. ALLARDT,
U. S. Deputy Surveyor.

Subscribed and sworn to before me, this 5th day of Feb'y, 1881.

J. A. ROBINSON,
U. S. Commr.

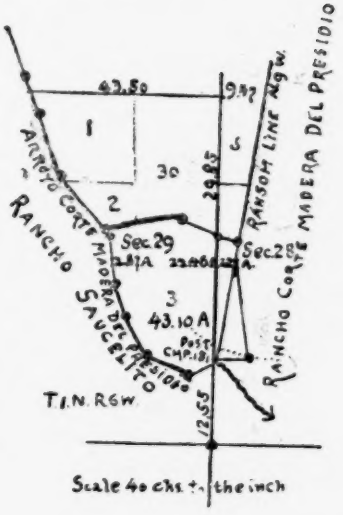
"EXHIBIT D" (Petition).

Senor General of the
Territory of Upper California.

Juan Read, of the Irish Nation, before your Excellency with due respect presents himself and says: That not having been able to obtain the place called "El Saucelito," he prays you to

16896

84 A


43.50
9.97
1
30
29.85
6
2
3
43.10 A
Sec 29
Sec 28
RANCHO SAUCELITO
ARROYO CORTE MADERA
RANSOM LINE N&W.
RANCHO CORTE MADERA DEL PRESIDIO
POST CMP. IRON
T.1.N. R6W.
12.55
Scale 40 chs. + to the inch

be so good as to grant him the place of "El Corte de Madera del Presidio" to the "Punta del Tiburon," as shown by the sketch or plan which your Excellency has in your possession. Wherefore, I pray your Excellency to be so good as to grant my petition, by which I shall receive favor and grace.

JUAN READ.

Pueblo de San Rafael, September 4th, 1834.

EXHIBIT E. (Grant and Juridical Possession).

Monterey, Sept. 23rd, 1834.

Join this to the foregoing.

FIGUEROA.

Stamp first (seal) six dollars.
For the years one thousand eight hundred and thirty-two and one thousand eight hundred and thirty-three.

EXHIBIT D AND E.

99 Jose Figueroa, General of Brigade of the Mexican Republic, Commanding General and Inspector and Superior Political Chief of Upper California.

Whereas, Don Juan Read, naturalized in the United States of Mexico, for his own personal benefit and that of his family, asked for the land known by the name of "Corte de Madera del Presidio" as far as "La Punta del Tiburon," bounded by the Mission of San Rafael and the Port of San Francisco, the proper measures and examinations being previously made as required by Laws and Regulations, using the powers which are conferred on me in the name of the Mexican Nation, I have, by decree of this day granted to the aforesaid Don Juan Read the above mentioned land, declaring to him the ownership of it by these presents, said grant being understood to be in entire conformity with the laws, subject to the approval or disapproval of the Most Excellent Territorial Deputation and of the Supreme Government, and under the following conditions:

1st. That he will submit to those (conditions)which may be established by the regulation which is to be formed for the distribution of vacant lands, and that in the meantime neither the grantee nor his heirs can divide or alienate that which is granted to them, subject it to any tax, entail, pledge, mortgage or other incumbrances even for pious purposes, nor convey it to mortain.

2nd. He may enclose it without prejudice to the crossings, roads and servitudes; he will enjoy it freely and exclusively, applying it to the use and cultivation which may best suit him;

but within one year at furtherest he will build a house and it will be inhabited.

3rd. When the ownership is confirmed to him, he will request the proper magistrate to give him juridical possession in virtue of this patent by whom the boundaries will be marked out, in the limits of which he will place some fruit or forest trees of a useful character.

4th. The land of which donation is made is one square league, a little more or less, as shown by the map which goes with the Expediente. The magistrate who may give the possession will cause it to be measured in conformity with
100 the ordinance in order to mark out the boundaries, leaving the surplus which may result to the nation for its convenient uses.

5th. If he contravene these conditions he will lose his right to the land and it will be denounceable by another person.

In consequence I order that this present, serving him for a title and being held as firm and valid, note be made of it in the corresponding book, and it be delivered to the person interested for his security and other purposes.

Given at Monterey on the second of October, eighteen hundred and thirty-four.

(Signed) JOSE FIGUEROA.

(Signed)
AGUSTIN V. ZAMORANO,
Secretary.

Note has been made of this title (in the book) of entries of grants of land on folio fifty-four number fifty-two which exists in the Secretaria in my charge. In Monterey on the 2nd of October, 1834.

(Signed)
ZAMORANO.

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* * * Being in the fields in the place named "Corte de Madera del Presidio de San Francisco" on the twenty-seventh day of the month of November, one thousand eight hundred and thirty-five, I, the constitutional Alcalde, acting in virtue of my office with two assistant witnesses for want of a public Notary the witnesses by me examined present citizen Juan Reed, owner of said lands and citizen Fernando Felis on the part of the Pueblo of San Rafael, as mayor domo of said pueblo and community, the only colindante on the north, I proceeded to see and examine the lands of said rancho, and for

greater clearness, mounting on horseback in company with both the parties and witnesses referred to, I ordered the latter to point out to me the places, limits and boundaries of them, according to the signs which they have declared on their depositions, and in conformity they led the way to the west
101 to a canada where they showed me a forest of tall trees which they call redwoods in the canada itself, and some little valleys which form the base of the high peak called "Palmos," which forest is called "Corte de Madera 'del Presidio," a little brook with a willow thicket, and the remains of a rancheria called "Anamus"; thence continuing the examination and view of said lands they led me north to another arroyo and forest of redwood trees called also "Corte de Madera de San Pablo," and they said it was the boundary with the Pueblo of San Rafael; and thence continuing the examination south as far as Point Taburon, which they said was the limit in that direction; we continued to the west to the point of an Estero which empties in the bight formed by said Point Taburon and Point Caballos on the south and which ends at the entrance of said canada where is situated the house of the owner of said lands, Don Juan Read, the arroyo, willow thicket and forest of redwood trees named "Corte de Madera del Presidio" aforesaid, which they said was the last boundary of the said lands pertaining to the rancho referred to, of "Corte de Madera" of Senor Read; which places I, the constitutional Alcalde, saw and examined with those of my assistance and said witnesses, and the papers presented, having been compared with said examination, the identification of the aforesaid lands proved to be certain according to the declarations of the witnesses; and in testimony I make official record of it and sign it with those of my assistance and others who knew how; to which I certify.

(Sgd.) HARO,
" FERNANDO FELES,
" JOSE DE LA C. SANCHEZ.
" TOMAS JEREMIAS JONES.
" MANUEL SANCHEZ.

Assisting witnesses
(Signed) EUSEBIO GALINDO,
" FRANCISCO SANCHEZ.

Office of the
102 SURVEYOR GENERAL
of the United States, for California.

I, Theo. Wagner, Surveyor-General of the United States for the State of California, and as such, having in my office and in my charge and custody, a portion of the Archives of the former Spanish and Mexican Territory, of Department of Upper California, as also the papers of the late Board of Commissioners to ascertain and settle the private land claims in California; by virtue of the power vested in me by law, do hereby certify, that the seven preceding and hereunto annexed pages of paper numbered from one to seven inclusive, exhibit a true, full and correct copy of Extracts from Translations of Expediente and Juridical Possession filed in Case No. 497 on the docket of the foresaid Board of Commissioners, "Claim of Heirs of Juan Read to Corte de Madera del Presidio," and now on file in this office, and in my custody; that I have carefully compared the same with said translations and that the same is a correct transcript therefrom, and of the whole of such translations.

In Testimony Whereof, I have hereunto signed my name officially, and caused my seal of office to be affixed, at the City of San Francisco, this fourteenth day of February, 1881.

[Seal.] THEO. WAGNER,
U. S. Surveyor-General for California.

"EXHIBIT F."

Decree of Board of Land Commissioners.

Heirs of Juan Read
vs.
The United States.

In this case on hearing the proofs and allegations, it is adjudged by the Commission that the said claim of the petitioners is valid and it is therefore hereby decreed that the same be confirmed.

The land of which confirmation is hereby made is the same on which said Juan Read resided in his lifetime; is known by the name of Corte de Madera del Presidio, is situated in
103 Marin County and bounded as follows, to wit: Commencing from the solar which faces west at a point at the slope and foot of the hills which lie in that direction and on the edge of the forest of redwoods called Corte de Madera del Presido, and running from thence in a northwardly direction four thousand five hundred varas to an arroyo called Holon where is another forest of redwoods called Corte de Ma-

dera de San Pablo; thence by the waters of said arroyo and the Bay of San Francisco ten thousand varas to the Point Taburon, said point serving as a mark and limit; thence running along the borders of said bay and continuing in a westerly direction along the shore of the bay formed by Point Caballos and Point Taburon, four thousand seven hundred varas to the north of the Canada and the point of the "Sausal" which is near the Estero lying east of the house on said premises which was occupied by said Juan Read on November, 1835; and thence continuing the measurement from east to west along the last line eight hundred varas to the place of beginning; containing one square league of land, be the same more or less; being the same land described in the testimonial of juridical possession on file in this case, as having been measured to said Juan Read under a grant of the same to him, to which testimonial and the map therein referred to and constituting a part of the expediente a traced copy of which is filed in the case reference is to be had.

ALPHEUS FELCH,
R. AUG. THOMPSON,
Commissioners.

(Endorsed.)

No. 497. Heirs of Juan Reid. Corte de Madera del Presidio. Decree of Confirmation. Filed in office June 13, 1854.

GEO. FISHER,
Secretary.

Recorded in Record of Decisions, volume 2, page 104.

GEO. FISHER,
Secretary.

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104 Office of the
SURVEYOR-GENERAL
of the United States, for California.

I, Theo. Wagner, Surveyor-General of the United States for the State of California, and as such, having in my office and in my charge and custody a portion of the Archives of the former Spanish or Mexican Territory, or Department of Upper California, as also the papers of the late Board of Commissioners, to ascertain and settle the private land claims in California; by virtue of the power vested in me by law do hereby certify that the three preceding and hereunto annexed pages numbered from one to three inclusive, exhibit a true, full and correct copy of the original decree of confirmation filed in case No. 497 on the Docket of the foresaid Board of Commissioners

together with the endorsements thereon Heirs of Juan Reid Corte de Madera and now on file in this office and in my custody: that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

In Testimony Whereof, I have hereunto signed my name officially, and caused my Seal of Office to be affixed, at the City of San Francisco, this 4th day of February, 1881.

[Seal.] THEO. WAGNER.

U. S. Surveyor-General for California.

"EXHIBIT G."

In the District Court of the United States, Northern District of California.

The United States, Appellants, vs. Heirs of John Read, Appellees.	No. 183 Corte de Madera del Presidio. Transcript No. 497.

Stated Term January 14th, 1856.

On appeal from the final decison of the Board of Commissioners to ascertain and settle private land claims in California.

Decree.

This cause came on to be heard at a stated Term of the Court on appeal from the final decision of the Board of Com-
105 missioners to ascertain and settle the private land claims in the State of California under the Act of Congress approved on the 3rd of March, A. D. 1851, upon the transcript of the proceedings and decision of the Board of Commissioners, and the papers and evidence on which the said decision was founded, and it appearing to the Court that the said Transcript has been duly filed according to law, and counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed that the said decision be, and the same is hereby in all things affirmed, and it is likewise further ordered, adjudged and decreed that the claim of the Appellees is a good and valid claim, and that the said claim be, and the same is hereby confirmed to the extent and quantity of one square league, being the same land described in the grant and of which the possession was proved to have been long enjoyed. Provided that the said quantity of

one square league now confirmed to the claimants be continued within the boundaries called for in the said grant and the map to which the grant refers, and if there be less than that quantity within the said boundaries, then we confirm to the Claimants that less quantity.

OGDEN HOFFMAN, Jr.,
U. S. District Judge.

Endorsed: Filed January 14, 1856.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy Clerk.

At a stated Term of the District Court of the United States of America, for the Northern District of California, held at the Court Room in the City of San Francisco, on Thursday, the second day of April, in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The Honorable Ogden Hoffman, District Judge.

The United States vs. Heirs of Juan Reid. } D. C. 183. L. C. 497.

The Attorney General of the United States, having given notice that appeal will not be prosecuted in this case,
106 and a stipulation to that effect having been entered into by the U. S. Attorney on motion of the District Attorney, it is ordered, adjudged and decreed that the Claimants have leave to proceed under the decree of this Court heretofore rendered in their favor as under Final Decree.

OGDEN HOFFMAN,
U. S. Dist. Judge.

Endorsed: Filed April 2nd, 1857.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

I, William H. Chevers, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be full, true and correct copies of their respective originals now on file, and remaining of record in my office.

Witness may hand the Seal of the said Court this seventh

day of May, A. D. 1858.

W. H. CHEVERS,
[Seal.] Clerk.

(Endorsed) *383.*

United States District Court, Northern District of California.

The United States vs. Heirs of Juan Read. } Corte de Madera del Presidio.

Filed U. S. S. Genl's Office, May 7, 1858.

Office
of the SURVEYOR GENERAL of the
United States for California.

I, T. Wagner, Surveyor-General of the United States for the State of California, do hereby certify that the four pages preceding and hereunto annexed is a full, true and correct copy of a certain instrument of writing now of record and on file in this office and in my custody; that I have carefully compared the same with said original, and that the same is a cor-
107 rect transcript therefrom, and of the whole of such original.

In Testimony Whereof, I have hereunto signed my name officially and caused my Seal of Office to be affixed at the City of San Francisco this 5th day of February, 1881.

[Seal.] THEO. WAGNER,
U. S. Surveyor-General for California.

(EXHIBIT H.)

Deed from John J. Reed, Hilaria M. Reed, Thomas B. Deffebach and Inez Reed, his wife, parties of the first part, to James C. Bolton of the City, County and State of New York, the party of the second part, dated the 12th day of August, 1865, whereby in consideration of $1.00 the parties of the first part granted, bargained, sold, remised, released and conveyed all the undivided one-half part of all the Rancho "Corte de Madera del Presidio," situate in the County of Marin, in the State of California, which is not included in the survey of the said Rancho, which was made under instructions from the U. S. Surveyor-General for the State of California by R. C. Matthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor-General for California, September 19, 1859, said approved survey containing four thousand four hundred and sixty 24-100 (4460.24) acres of land. The said rancho being the same which was granted to Juan Reed by the Mexican Government. It being expressly under-

stood that this deed conveys no interest in the four thousand, four hundred and sixty 24-100 acres embraced in the above-mentioned approved survey.

Duly acknowledged by all parties August 12th, 1865, recorded August 16th, 1865, in the County Recorder's office of Marin County, in book "E" of Deeds at page 460.

(EXHIBIT "J.")

Deed from James Clinton Bolton of the City, County and State of New York, party of the first part, and Rudolph Steinbach of the City and County of San Francisco, State of
108 Cal'a, party of the second part, dated the 16th day of September, 1865, whereby in consideration of the sum of $5.00, the party of the first part granted, bargained and sold, conveyed and confirmed all the undivided one-fourth part of all the Rancho Corte Madera del Presidio, situate in the County of Marin, in the State of California, which is not included in the survey of the said rancho which was made under instructions from the U. S. Surveyor General for the State of California by R. C. Mathewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor General for California, Sept. 19, 1859. Said approved survey, containing four thousand four hundred and sixty 24-100 (4460.24) acres of land. The said rancho being the same which was granted to Juan Reid by the Mexican Government.

Acknowledged by the party of the first part September 16th, 1865; recorded September 22nd, 1865, in the County Recorder's office of Marin County in book "E" of Deeds at page 417.

(EXHIBIT "K.")

Deed from Rudolph Steinbach of the City and County of San Francisco, party of the first part, to Emil Steinbach of the same place, the party of the second part, dated the 28th day of March, 1866, whereby in consideration of the sum of $1000.00 the party of the first part granted, bargained and sold, remised, released and conveyed all the undivided one-fourth part of all the Ranch "Corte de Madera del Presidio," situate in the County of Marin in the State of California, which is not included in the survey of the said rancho which was made under instructions from the U. S. Surveyor General for the State of California, by R. C. Matthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, U. S. Surveyor General for California, September 19th, 1859, said approved survey containing four thousand four hundred and

sixty 24-100 (4460.24) acres of land. The said ranch being the same which was granted to Juan Reed by the Mexican Government.

Duly acknowledged by the party of the first part
109 March 28th, 1866; recorded May 26th, 1866, in the County Recorder's office of Marin County in Book "E" of Deeds at page 569.

(EXHIBIT "L."

Know all men by these presents, That I, Emil Steinbach, late of the County of Napa, now residing at the City of San Francisco, State of California, have made, constituted and appointed and by these presents do make, constitute and appoint Rudolph Steinbach of the City of San Francisco, State of California, my true and lawful attorney for me and in my name and stead, and for my use and benefit to ask, demand, sue for, recover and receive all sums of money, debts and demands whatsoever, which are now due and owing or shall hereafter become due, owing or demandable to me and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof by attachments, arrests, distress or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for me and in my name to make, seal and deliver, to receive legacies and bequests, to collect rents, interests, dividends or annuities due or to grow due, to bargain, contract, agree for, purchase, receive and take lands, tenements and hereditaments and accept the seizen and possession of all land and all deeds and other assurances in the law therefor and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, hypothecate lands, tenements and hereditaments, upon such terms and conditions and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and for also for me and in my name, and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes,
110 receipts, evidences of debt, releases and satisfaction of mortgages, judgments and other debts, and other instruments in writing of whatever kind and nature and other

attorneys, one or more, in his place and stead or under him, to make, constitute and appoint and the same at his pleasure to annul, remove and revoke.

Giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof I have hereunto set my hand and seal the 18th day of February, 1864.

EMIL STEINBACH. [Seal.]

Signed, sealed and delivered in the presence of

F. J. THIBAULT.

Duly acknowledged by Emil Steinbach February 19th, 1864; recorded April 25th, 1867, in the County Recorder's Office in Book "B" Powers of Attorney at page 163.

(EXHIBIT M.)

Deed from Emil Steinbach of the City and County of San Francisco, State of California, the party of the first part, to Emil Grisar, of the same place, the party of the second part, dated 16th day of June, 1866, whereby in consideration of the sum of $1250.00 the party of the first part granted, bargained and sold all the undivided one-fourth of all the Rancho "Corte de Madera del Presidio," situate in the County of Marin, in the State of California, which is not included in the survey of the said rancho which was made under instructions from the U. S. Surveyor-General of the State of California, by R. C. Matthewson, Deputy Surveyor, on October, 1858, and approved by J. W. Mandeville, U. S. Surveyor-General for California, September 19th, 1859, said approved survey containing four
111 thousand four hundred and sixty 24-100 (4460.24) acres of land, the said rancho being the same which was granted to Juan Reid by the Mexican Government.

Duly acknowledged by Rudolph Steinbach as the attorney in fact of Emil Steinbach, June 18th, 1866, recorded April 25, 1867, in the County Recorder's Office of Marin County in Book "F" of Deeds at page 279.

(EXHIBIT "N.")

Deed from Emil Grisar of the City and County of San Fran-

cisco, State of California, the party of the first part, to Samuel R. Throckmorton of the same place, party of the second part, dated June 19th, 1866, whereby in consideration of the sum of $1250.00 the party of the first part granted, bargained and sold, conveyed and confirmed all the one-fourth part of all the rancho "Corte de Madera del Presidio," situate in the County of Marin, in the State of California, which is not included in the survey of said rancho which was made under instructions from the U. S. Surveyor-General for the State of California by R. C. Matthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor-General for the State of California, September 19th, 1859, said approved survey containing four thousand four hundred and sixty 24-100 (4460.24) acres of land, the said rancho being the same which was granted to Juan Reid by the Mexican Government.

Duly acknowledged by Emil Grisar, June 21st, 1866, recorded April 25th, 1867, in the County Recorder's Office of Marin County in Book "F" of Deeds at page 278.

(EXHIBIT "O.")

Deed from James Clinton Bolton of the City, County and State of New York, the party of the first part to Thomas B. Valentine of the City and County of San Francisco, State of California, the party of the second part, dated the 25th day of July, 1868, whereby in consideration of the sum of $1500.00,
the party of the first part granted, bargained, sold,
112 aliened, remised, released, conveyed and confirmed all
the undivided one-fourth part of all the Rancho "Corte Madera del Presidio," situate in the County of Marin, in the State of California, which is not included in the survey of said rancho which was made under instructions from the U. S. Surveyor-General for the State of California by R. C. Matthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor-General for California, September 19th, 1859, said approved survey containing 4460.24 acres of land. The said rancho being the same which was granted to Juan Reed by the Mexican Government.

Duly acknowledged by the party of the first part July 29th, 1868, recorded August 27th, 1868, in the County Recorder's Office of Marin County in Book "G" of Deeds at pages 116 and 117

(EXHIBIT "P.")

Deed from John J. Reed of the County of Marin, State of California, the party of the first part, to Hugh A. Boyle of the City and County of San Francisco, the party of the second part, dated May 11th, 1869, whereby in consideration of the sum of $5.00 the party of the first part granted, bargained and sold, conveyed and confirmed all the right, title and interest of the party of the first part of, in and to all that certain rancho or tract of land situate in the County of Marin, State of California, known as the "Rancho Corte de Madera del Presidio," which is not included in the survey of said rancho made under instructions from the United States Surveyor-General for California by R. C. Matthewson, Deputy Surveyor, in October, 1858, approved by J. W. Mandeville, U. S. Surveyor-General for California, September 19th, 1859, containing 4460.24-100 acres, said rancho being the same granted to Juan Reed by the Mexican Government. It being expressly understood that this deed conveys no interest in the 4460.24-100 acres embraced in the above-named survey.

Duly acknowledged by the party of the first part May 12th, 1869, recorded February 6th, 1871, in the County Re-
113 corder's Office of Marin County, in Book "J" of Deeds at pages 9 and 10.

(EXHIBIT "Q.")

Deed from Hilarita Reed (spinster) of the City and County of San Francisco, State of California, the party of the first part, to Hugh A. Boyle of the same place, party of the second part, dated the 24th day of May, 1869, whereby in consideration of the sum of $5.00, the party of the first part granted, bargained and sold, conveyed and confirmed all the right, title and interest of the party of the first part of, in and to all that certain rancho or tract of land situate in the County of Marin, State of California, known as the "Rancho Corte de Madera del Presidio," which is not included in the survey of said rancho made under instructions from the United States Surveyor-General for California, by R. C. Matthewson, Deputy Surveyor, in October, 1858, approved by J. W. Mandeville, U. S. Surveyor-General for California, September 19, 1859, containing 4460.24-100 acres, said rancho being the same granted to Juan Reed by the Mexican Government. It being expressly understood that this deed conveys no interest in the 4460.24-100 acres embraced in the above-named survey.

Duly acknowledged by the party of the first part June 3rd,

1869, recorded February 6th, 1871, in the County Recorder's Office of Marin County, in Book "J" of Deeds at pages 11 and 12.

(EXHIBIT "R.")

Deed from Thomas B. Deffebach and Inez Reid Deffebach of the County of Marin, State of California, Hugh A. Boyle and Maria Garcia de Boyle, his wife, Thomas B. Valentine and H. C. Newhall of the City and County of San Francisco, parties of the first part, to Julius C. McCeney of the City and County of San Francisco, State aforesaid, dated the 1st day of February, 1871, whereby in consideration of the sum of $5.00 the parties of the first part granted, bargained and sold all that certain tract, piece or parcel of land situate, lying and
114 being in the County of Marin, State of California, described as follows, to wit: Beginning at a post marked C. M. P. 181, distant 20 chains north of corner, sections 28, 29, 32 and 33, in township 1 north, range 6 west, Mount Diablo Meridian, from which a madrona tree four feet in diameter marked B. T. C. M. P. 181 bears south 24 degrees east 87 links distant; said post is station 181 on R. C. Matthewson's survey of the Rancho Corte Madera del Presidio, as approved by the United States Surveyor-General for the State of California, September 19th, 1859; thence along the line of said Matthewson's survey east 6.38 chains to station, a post in stone mound, from which an oak 22 inches in diameter bears N. 17.½ degrees W. 33 chains, and said madrona tree bears S. 82.½ degrees W.; thence leaving said Mathewson's survey, north 9 degrees west 29.90 chains to station; thence north 70.¾ degrees west 10.70 chains to station post marked "A"; thence south 73.¾ degrees west, 16.65 chains to station in center of the creek known as "Arroyo de Corte Madera del Presidio"; thence down the center of soid creek, with the meanders thereof, according to William J. Lewis' survey of the Rancho Saucelito, approved October 2nd, 1860, by the said Surveyor-General, south 39.¾ degrees east 1.50 chains to station 11 of said Lewis' survey; thence south 4.¼ degrees east, 10.74 chains to station 12 of said Lewis' survey; thence south 35 degrees east 10.30 chains to station 14 of said Lewis' survey; thence south 71.¼ degrees east 10.78 chains to station 15 of said Lewis' survey; thence north 70.¼ degrees east 3.90 chains to station 16 of said Lewis' survey; thence south 33.¾ degrees east 0.40 chains to station in center of said arroyo and on line between sections 28 and 29, township 1 north, range 6 west, 17.55 chains north of corner, sec-

tions 28, 29, 32 and 33; thence leaving said creek and survey, north 2.45 chains, to the post marked C. M. P. 181, the place of beginning, containing 80.24 acres of land.

Duly acknowledged by the parties of the first part February 2nd, 1871, recorded February 6, 1871, in the Marin County Recorder's Office in Book "J" of Deeds at pages 24, 25, 26 and 27.

(EXHIBIT "S.")

Deed from Julius C. McCeney of the City and County of San Francisco, State of California, the party of the first part,
115 to Samuel R. Throckmorton of the same place, the party of the second part, dated January 19th, 1875, whereby the party of the first part for and in consideration of the sum of $1.00 granted, bargained and sold all that certain tract, piece or parcel of land which is described in the foregoing deed from Thomas B. Deffebach and others to Julius C. McCeney, dated February the 1st, 1871, and recorded in Book "J" of Deeds at page 24.

Duly acknowledged by Robert George as a subscribing witness May 14th, 1875, recorded February 24th, 1876, in the Recorder's Office of Marin County in Book "J" of Deeds at pages 206, 207 and 208.

Field Notes of a Survey of a Tract of Land Situated in Marin County, California, and Surveyed for Samuel R. Throckmorton, Esquire, by G. F. Allardt, Surveyor, on January 7th, 1871.

(See Annexed Plat.)

Run by the True Meridian—Magnetic Variation 16 Degrees 20 Minutes East.

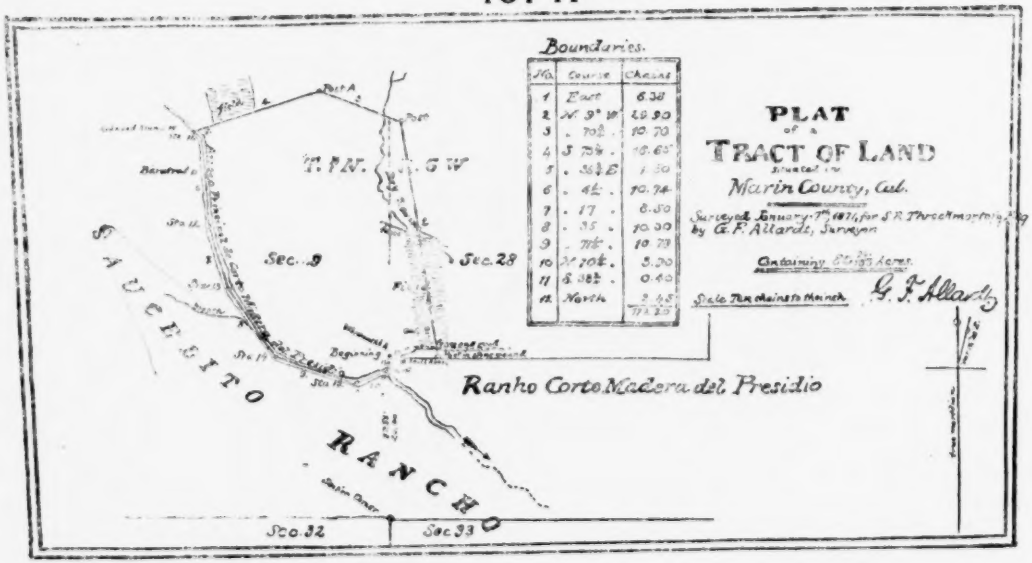
Beginning at a post marked C. M. P. 181, distant 20 chains north of corner sections 28, 29, 32 and 33, in township 1 north, range 6 west, Mount Diablo meridian, from which a madrona tree, 4 feet in diameter, marked B. T. C. M. P. 181, bears S. 24 degrees E. 87 links distant. Said post is station 181 on R. C. Matthewson's survey of the Rancho "Corte Madera del Presidio," as approved by the U. S. Surveyor-General, September 19th, 1859.

Thence along the line of said Matthewson's survey:

No.	Course.	Chains.	
1.	East.	1.00	Wormouth's house is 5 links to left;
		2.10	cross fence, course N. 60 degrees E.;

		6.38	to station—set a post in stone mound from which an oak 22 inches in diameter bears N. 17.½ W. 3.33 chains and said madrona
116			tree bears S. 82.½ W. Thence, leaving said Matthewson's Survey and over slightly rolling ground—
2.	N. 9 deg. W.	1.00	cross fence course E. and W..
		1.20	cross road course E. and W. and enter ploughed field;
		15.36	cross fence course N. 71 W. 8. 71 E. and leave field 15.58 cross dry ravine, course S. 70 E. 29.90 to station; set a post and descend;
3.	N. 70.¾ deg. W.	2.10	cross same ravine course southerly and ascend steep slope;
		10.70	to station on top of grassy spur—set a post marked A and ascend—
4.	S. 73.¾ W.	8.50	to foot of steep slope opposite corner of field;
		14.20	cross fence and bars, Co. N. 15. W. 16.50 to redwood stump 27 in. diam. (which I marked W.) on left bank of the Arroyo "Principal de Corte Madera del Presidio";
		16.65	to sta. in center of said creek; thence down the center of said creek, with the meanders thereof, according to Wm. J. Lewis' survey of the Rancho Saucelito; surveyed in March, 1858, and approved by the U. S. Surveyor-General, October 2nd, 1860;
5.	S. 39.¾ E.	1.50	to station S. 11, of said Lewis' Survey.
6.	S. 4.½ E.	10.74	to station S. 12, of said Lewis' Survey.
7.	S. 17 E.	8.50	to station S. 13, of said Lewis' Survey.
8.	S. 35 E.	10.30	to station S. 14, of said Lewis' Survey (at 5 chs. to junction of

101 A


Boundaries.
No. Course Chains
1 East 6.38
2 N. 9° W. 48.90
3 . 70½ . 10.70
4 S. 75¾ . 18.65
5 . 36½ E. 1.50
6 . 4½ . 70.74
7 . 17 . 6.50
8 . 35 . 70.90
9 . 77½ . 10.79
10 N. 70½ . 5.00
11 S. 38½ . 0.40
12 North 2.45
773.25
PLAT
of a
TRACT OF LAND
situated in
Marin County, Cal.
Surveyed January 7th 1871 for J. R. Throckmorton
by G. F. Allardt, Surveyor
Containing 6 93/100 Acres.
Scale Ten chains to Inch.
G. F. Allardt
T. 1 N.
R. 6 W.
Sec. 9
Sec. 28
Sec. 32
Sec. 33
Beginning
SAUCELITO
RANCHO
Rancho Corte Madera del Presidio

16905

117 right branch of said Arroyo bears west);

9. S. 71.¼ E. 10.78 to station S. 15, of said Lewis' Survey.

10. N. 70.¼ E. 3.90 to station S. 16 of said Lewis' Survey.

11. S. 33.¾ E. 0.40 to station in center of said creek (arroyo) and on line between sections 28 and 29, T. 1 N., R. 6 W., 17.55 chains north of corner sections 28, 29, 32 and 33; thence leaving said creek and survey;

12. N 2.45 to the post C. M. P. 181, the place of beginning. Containing 80.24 acres.

G. F. ALLARDT,
Surveyor.

San Francisco, Jan'y 10, 1870.

[Map.]
See Original Transcript.

The foregoing are the field notes and map of the survey which is referred to in the deed made from Thomas B. Deffebach and Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall to Julius McCeney.

Feb. 1st, 1871.

THOS. B. DEFFEBACH.
INEZ REED DEFFEBACH.
S. R. THROCKMORTON.

Duly acknowledged by Thomas B. Deffebach and Inez Reed Deffebach, his wife, and Samuel R. Throckmorton, February 2nd, 1871, before James G. Carson, a notary public in and for the City and County of San Francisco, recorded in the office of the County Recorder of Marin County, February 6th, 1871, in Liber "J" of deeds at pages 30, 31 and 32.

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118 (EXHIBIT "U.")

In the Circuit Court of the United States for the Northern District of California, Tenth Circuit.

JAMES CLINTON BOLTON,

Plaintiff,

vs.

JOHN L. VAN REYNEGAN, JONATHAN BICKERSTAFF, R. S. BROWN, DAVID CLINGAN, JAMES CUMMINGS, PETER DOLAN, MICHAEL DOWD, MART TIERNEY, PETER GARDNER, LOUIS DENOS, FRANCISCO ANGENETT, JOSE ALBORUOS, MARY KING, GEORGE HANSON, PHILIP RAY, EDWARD WORMOUTH, JOHN DOE, RICHARD ROE, JOHN BLACK, PETER BLUE AND GEO. WHITE,

Defendants.

The plaintiff, James Clinton Bolton, by Brooks & Whitney, his attorneys, complains of John L. Van Reynegan, Jonathan Bickerstaff, R. S. Brown, David Clingan, James Cummings, Peter Dolan, Michael Dowd, Mert Tierney, Peter Gardner, Louis Denos, Francisco Angenett, Jose Alborunos, Mary King, George Hanson, Philip Ray, Edward Wormouth, John Doe, Richard Roe, John Black, Peter Blue and George White, defendants, the last five names being fictitious names intended to designate certain defendants whose true names are unknown to plaintiff, and whose true names, when discovered, he prays, may be here inserted.

And for cause of action he alleges:

That the plaintiff is a citizen and resident of the State of New York, and the defendants are citizens and residents of the State of California.

That on the 12th day of August, 1865, the plaintiff was, and ever since has been, the owner in fee simple absolute and entitled to the possession of that certain tract of land situate, lying and being in the County of Marin, in said State of California, bounded and described as follows, to wit:

119 Commencing at the westerly corner of the solar, on the creek called Corte de Madera del Presidio, near the old sawmill at the foot of the hills and in the edge of the forest of redwoods called Corte de Madera del Presidio; thence running north 28 degrees east 162 chains to a laurel 24 inches in diameter, marked P. Q. 99, a point in the survey of the Rancho Punta de Quentin on the Arroyo Holon at Corte de Madera de San Pablo; thence following down the Arroyo Holon, north 26.¾ degrees east 15 chains 10 links to a laurel 36 inches in diameter, marked P. Q. 98; thence north 17.½ degrees east 9

chains 55 links to a redwood marked P. Q. 97; thence north 33 degrees east 20 chains 20 links to the mouth of the Arroyo Holon; thence along the border of the marsh of San Francisco Bay north 86 degrees east 5 chains 60 links, thence south 35.¼ degrees east 6 chains 80 links; south 46.½ degrees west 7 chains; south 86.½ degrees east 9 chains 60 links; north 79 degrees east 13 chains 80 links; south 18 degrees west 16 chains; south 69 degrees east 17 chains 10 links; south 60.½ degrees east 10 chains 20 links; south 1.¼ degrees east 6 chains 70 links; south 42.¼ degrees west 6 chains; south 76 degrees west 13 chains 90 links; south 30.¼ degrees west 14 chains 20 links; south 32 degrees east 5 chains 70 links; south 80.½ degrees east 37 chains; south 64.¼ degrees east 6 chains 60 links; south 69.½ degrees east 13 chains; south 52.¾ east 11 chains 80 links; south 24.¼ degrees east 7 chains; north 72 degrees east 5 chains; south 57 degrees east 4 chains; south 40.¾ degrees west 12 chains; south 10.¾ degrees east 25 chains 79 links to a post marked C. M. P. No. 1, then, leaving the salt marsh, south 21 chains 30 links; west 40 chains; south 20 chains; west 60 chains; south 20 chains; west 40 chains; south 2 chains 45 links to the Arroyo Corte de Madera del Presidio; thence down said Arroyo south 33.¾ degrees east 5 chains 80 links; south 59.¼ degrees east 6 chains 40 links; south 41.¾ degrees east 24 chains 10 links to a laurel on the bank of the arroyo 24 inches in diameter marked C. M. P. 177 S 19, thence S. 9.¼ degrees west 7 chains 15 links to the Punta de Sausal; thence north 59.¾ degrees west 83 chains 63 links to the point of commencement—containing 2038.56 acres; being a
120 portion of the Rancho Corte de Madera del Presidio, which was granted to Juan Reid by the Mexican Government, and of which juridical possession was delivered to him. The claim for which rancho under said grant was duly presented to the Board of Commissioners for the settlement of private land claims in the State of California by the widow and heirs of the said Juan Reid, and which was duly confirmed by said Board and the District Court of the United States for the Northern District of California, and for which no patent has as yet been issued.

That being so, the owner and entitled to the possession of said tract of land, the said defendants on the 13th day of August, 1865, unlawfully and wrongfully entered upon the same and ousted the plaintiff therefrom, and from thence hitherto have unlawfully and wrongfully withheld and still unlawfully and wrongfully withhold and detain the posses-

sion thereof from the plaintiff, whereby he has suffered damages to the amount of $10,000.00.

Wherefore, the plaintiff prays judgment against the said defendants for the restitution of said tract of land and for $10,000.00 damages, besides costs of suit.

BROOKS & WHITNEY,
Attorneys for Plaintiff.

Endorsed: Filed Oct. 30th, 1865.

GEO. C. GORHAM,
Clerk.

Pr. W. F. HUERTIS,
Deputy Clerk.

I, Lorenzo S. Sawyer, Clerk of the Circuit Court of the United States for the District of California, do hereby certify the foregoing to be a true, full and correct copy of the complaint in the therein entitled cause.

Attest my hand and seal of said Circuit Court this 15th day of February, A. D. 1881.

[Seal.] L. S. B. SAWYER,
Clerk.

By J. F. O'BEIRNE,
Deputy Clerk.

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121 (EXHIBIT "V.")

In the United States Circuit Court, Ninth Judicial Circuit, District of California.

James C. Bolton,
vs.
John L. Van Reynegan, Jonathan Bickerstaff, et al. } No. 190.

This cause having come on regularly for trial in its place upon the calendar, on the 25th day of August, 1870, B. S. Brooks, Esq., appearing as counsel for plaintiff and J. M. McShafter and E. L. Gould, Esqs., for defendants, and a trial by jury having been expressly waived by a stipulation in writing signed by counsel for the plaintiff and the defendants and filed with the Clerk of said Court, the cause was tried before the Court sitting without a jury as to all of the defendants, excepting Peter Dolan and Michael Dowd, as to which said last-named defendants said cause was discontinued, and after hearing testimony, oral and documentary, and arguments of counsel for the plaintiff and the defendants, said cause was submitted to the Court for consideration and decision. And after

due deliberation, and the Court having filed its findings thereon, it is considered by the Court that said plaintiff do have and recover of and from the defendants, John L. Van Reynegan, Jonathan Bickerstaff, R. L. Brown, David Clingan, James Cummings, Peter Gardner, Louis Denos, Francisco Angenette, Mart Tierney, Edward Wormouth and Victor Garnow, the possession of those certain lands and premises situate in the County of Marin, State of California, and described in the amended complaint herein as being part of the Rancho Corte Madera del Presidio or Reed Ranch, bounded and described as follows, to wit: Commencing at station 181 of the survey of R. C. Mathewson of the Rancho Corte Madera del Presidio, running thence north 8.½ degrees east 152 chains to a laurel 24 inches in diameter marked P. Q. 99, a point in the survey of the Rancho Punta de Quentin on the Arroyo Holon at the Corte Madera de San Pablo, thence following down the
122 Arroyo Holon north 26.¾ degrees east 15 chains 10 links to a laurel 36 inches in diameter marked P. Q. 98; thence north 17.½ degrees east 9 chains 55 links to a redwood marked P. Q. 97; thence north 33 degrees east 20 chains 20 links to the mouth of the Arroyo Holon; thence along the border of the marsh of San Francisco Bay north 86 degrees east 5 chains 60 links, thence south 35.¼ degrees east 6 chains 80 links; south 46.½ degrees west 7 chains; south 86.½ degrees east 9 chains 60 links; north 79 degrees east 13 chains 80 links; south 18 degrees west 16 chains; south 69 degrees east 17 chains 10 links; south 60.½ degrees east 10 chains 20 links; south 1.¼ degrees east 6 chains 70 links; south 42.½ degrees west 6 chains; south 76 degrees west 13 chains 90 links; south 30.¼ degrees west 14 chains 20 links; south 32 degrees east 5 chains 70 links; south 80.½ degrees east 37 chains; south 64.¼ degrees east 6 chains 60 links; south 69.¼ degrees east 13 chains; south 52.¾ degrees east 11 chains 80 links; south 24.½ degrees east 7 chains; north 72 degrees east 5 chains; south 57 degrees east 4 chains; south 40.¾ degrees west 12 chains; south 10.¾ degrees east 25 chains 79 links to a post marked C. M. P. No. 1, thence leaving the salt marsh, south 21 chains 30 links; west 40 chains; south 20 chains; west 60 chains; south 20 chains; west 40 chains to said station 181, the point of commencement. Containing 1500 acres, more or less, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of $536.44.

And that said plaintiff have and recover of and from said defendant R. S. Brown the sum of $426.00 for his damages for

the detention of said lands and from the said defendant Francisco Angenetti the sum of $450.00 for damages for the detention of said land and from said defendant Peter Gardner the sum of $496.00 damages for the detention of said land.

And that as to the said defendants George Hansom and Mary King that said defendants go thence without day.

Judgment entered this 26th day of July, A. D. 1871.

L. S. B. SAWYER,
Clerk.

123 I, Lorenzo S. B. Sawyer, Clerk of the Circuit Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the judgment in the therein entitled cause.

Attest my hand and seal of said Circuit Court this 5th day of February, A. D. 1881.

[Seal.] L. S. B. SAWYER,
Clerk.

By J. F. O'BEIRNE,
Deputy Clerk.

(EXHIBIT "W.")

In the Circuit Court of the United States of the Ninth Judicial Circuit District of California.

The President of the United States of America to the Marshal of the United States of America, District of California. Greeting:

Whereas James Clinton Bolton, plaintiff, on the 26th day of July, A. D. 1871, recovered a judgment in said above-named Court against John L. Van Reynegan, Jonathan Bickerstaff, R. S. Brown, David Clingan, James Cummings, Peter Gardner, Louis Denos, Francisco Angenetti, Mart Tierney, Edward Wormouth and Victor Garnow, for the possession of certain premises more particularly described hereinafter together with damages for the unlawful detention of said premises and for costs and disbursements in this action expended.

And whereas, the judgment roll in which said James Clinton Bolton is plaintiff and John L. Van Reynegan, Jonathan Bickerstaff, R. S. Brown, David Clingan, James Cummings, Peter Gardner, Louis Denos, Francisco Angenetti, Mart Tierney, Edward Wormouth and Victor Garnow are defendants, has been filed in the Clerk's office of said Court in the City and County of San Francisco, and the said judgment has been docketed in said Clerk's office.

Now, therefore, you, the said Marshal, are hereby com-

manded and required to place the said James Clinton Bolton in quiet and peaceable possession of the lands and
124 premises in said judgment described as follows, viz: All and singular the possession of the entire premises described in the amended complaint, filed February 11th, A. D. 1871. Commencing at station 181 of the survey of R. C. Matthewson of the Rancho Corte Madera del Presidio, running thence north 8.½ degrees east 152 chains to a laurel 24 inches in diameter, marked P. Q. 99, a point in the survey of the Rancho Punta de Quentin on the Arroyo Holon at the Corte Madera de San Pablo; thence following down the Arroyo Holon, north 26.¾ degrees east 15 chains 10 links to a laurel 36 inches in diameter, marked P. Q. 98; thence north 17.½ degrees east 9 chains to a redwood marked P. Q. 97; thence north 33 degrees east 20 chains 20 links to the mouth of the Arroyo Holon; thence along the border of the marsh of San Francisco Bay north 86 degrees east 5 chains 60 links, thence south 35.¼ degrees east 6 chains 80 links; south 46.½ degrees west 7 chains; south 86.½ degrees east 9 chains 60 links; north 79 degrees east 13 chains 80 links; south 18 degrees west 16 chains; south 69 degrees east 17 chains 10 links; south 60.½ degrees east 10 chains 20 links; south 1.¼ degrees east 6 chains 70 links; south 42.½ degrees west 6 chains; south 76 degrees west 13 chains.90 links; south 30.¼ degrees west 14 chains 20 links; south 32 degrees east 5 chains 70 links; south 80.½ degrees east 37 chains; south 64.¼ degrees east 6 chains 60 links; south 69.½ degrees east 13 chains; south 52.¾ degrees east 11 chains 80 links; south 24.½ degrees east 7 chains; north 72 degrees east 5 chains; south 57 degrees east 4 chains; south 40.¾ degrees west 12 chains; south 10.¾ degrees east 25 chains 79 links to a post marked C. M. P. No. 1, thence leaving the salt marsh, south 21 chains 30 links; west 40 chains; south 20 chains; west 60 chains; south 20 chains; west 40 chains to said station 181, the point of commencement. Containing 1500 acres, more or less.

And these are further to command you, the said Marshal, that you cause to be made by distress and sale of the goods and chattels of the defendant R. S. Brown the sum of $426.00 for his damages for the detention of said lands; by distress and sale of the goods and chattels of the defendant
125 Francisco Angenetti the sum of $450.00 damages for the detention of said lands; and by distress and sale of the goods and chattels of the defendant Peter Gardner the sum of $496.00 damages for the detention of said land. And

also the further sum of $536.44, plaintiff's costs and disbursements in this action, and all costs that may accrue; and of this Writ make legal service and return on the 30th day after your receipt thereof.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this the 25th day of September in the year of our Lord 1871, and of the Independence of the United States of America the 96th.

Attest my hand and the seal of said Circuit Court at San Francisco in said Circuit and District the day and year last above written.

[Seal.] L. S. B. SAWYER,
Clerk.

By J. F. O'BEIRNE,
Deputy Clerk.

U. S. MARSHAL'S OFFICE,
District of California.

I hereby certify that I received a Writ of Restitution issued from the U. S. Circuit Court for the District of California, on a judgment rendered in favor of Plaintiff's at the suit of James Clinton Bolton vs. John L. Van Reynegan et al., on the 26th day of September, A. D. 1871; and served the same on John L. Van Reynegan, Jonathan Bicherstaff, R. L. Brown, David Clingan, James Cummings, and on Mrs. P. Gardner, wife of Peter Gardner, Louis Denos, Francisco Angenetti, and on the widow of Mart Tierney, Edward Tierney, Edward Wormouth and Victor Garnow. And on the 10th day of October, A. D. 1871, collected from Francisco Angenetti the sum of $602.00, the amount of the judgment and accruing costs due from him. And on the 23rd day of October, A. D. 1871, collected the sum of $956.90, the amount of the General Judgment and for accruing costs.

126 In regard to the execution against R. S. Brown and Peter Gardner I return the writ unsatisfied. I placed the plaintiff in quiet and peaceable possession of the entire premises described in the writ, H. C. Newhall, T. B. Valentine, H. A. Boyle and Inez Reed Deffebach and T. B. Deffebach receiving possession thereof for plaintiff as successors in interest. WM. GOVERNEUR MORRIS,
U. S. Marshal.

A. C. TAYLOR,
Deputy.

San Francisco, November 7th, 1871.

OFFICE OF THE MARSHAL
for the District of California.

In conformity with an order of Court to me this day directed, the foregoing return is hereby amended as to state that where the foregoing was executed it was not extended to the piece of ground occupied by the house of Peter Gardner near the line of the marsh on San Francisco Bay at the time of execution thereof, it not being able definitely to ascertain whether said house was embraced within the boundary described in said writ.

Dated San Francisco, this 17th day of May, A. D. 1871.

WM. GOUVENEUR MORRIS,
U. S. Marshal.

By A. C. Taylor, Deputy.

Endorsed: Filed May 17th, 1872.

L. S. B. SAWYER,
Clerk.

By J. F. O'BEIRNE,
Deputy Clerk.

I, Lorenzo S. B. Sawyer, Clerk of the Circuit Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the Writ of Possession in the therein entitled cause.

127 Attest my hand and seal of said Circuit Court this 5th day of February, A. D. 1881.

[Seal.] L. S. B. SAWYER,
Clerk.

J. F. O'BEIRNE,
Deputy Clerk.

(EXHIBIT "X.")

In the District Court of the 22nd Judicial District, in and for the County of Marin.

Samuel R. Throckmorton,
Plaintiff,

vs.

Ebenezer Wormouth,
Defendant.

Samuel R. Throckmorton, plaintiff in the above-entitled action, complains against Ebenezer Wormouth, defendant

therein, and for cause of action against the said defendant alleges as follows:

That, to-wit: On the 26th day of July, 1871, this plaintiff was, has ever since been and now is the owner in fee, and possessed and entitled to the possession of all and singular the following described real property, to-wit: All that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, bounded and described as follows: Beginning at a post marked "C. M. P. 181," in the Mathewson survey of the Rancho Corte Madera del Presidio, made in 1858, and filed in the United States Surveyor General's office for California, from which post a madrona tree four feet in diameter marked "B. T. C. M. P. 181" bears south 24 degrees east 87 links distant, thence according to the true meridian, the magnetic variation being 16 degrees 30 minutes east, as follows: East 2.12 chains to E. Wormouth's fence; thence along his fence and including the same north 60 degrees east 2.23 chains to south post of a gate across a road (course of road east and west, north 15½ degrees east 1.11 chains to angle in fence, north 60 degrees west 3.53 chains to angle in fence, north 8 degrees west 2.36 chains to a line laid down on the plat of the official survey of the Rancho Corte Madera del Presidio, as surveyed by Leander Ransom, and now on file in the United States Surveyor General's office for California, which line runs north 9 degrees east from said post "C. M. P. 181," and thence south 9 degrees west 6.34 hains along said line to said post "C. M. P. 181," the place of beginning.

That the said plaintiff being so as aforesaid seized and
128 possessed and entitled to the possession of the aforesaid real property, the said defendant afterwards, to-wit, on the 27th day of July, 1871, wrongfully entered into and upon the said land and premises and ousted the plaintiff therefrom, and from thence hitherto has and still unlawfully detains the same and every part thereof from the plaintiff, to the damage of the plaintiff of $5000.00. That the use and occupation of said land and premises has during the aforesaid time been, and is of the value of one hundred dollars per annum.

Wherefore, plaintiff demands judgment against the said defendant for the restitution and recovery of the possession of the aforesaid real property with damages for the detention thereof by the defendant of $5000.00, and for the value of the use and occupation of the same to the amount of $5000.00 and costs of this action.

WM. IRVINE,
Plaintiff's Attorney.

City and County of San Francisco—ss.

Samuel R. Throckmorton being duly sworn deposes that he is the plaintiff in the foregoing complaint, that he has read the said complaint and knows the contents thereof, and that the same is true of his own knowledge, excepting the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

SAMUEL R. THROCKMORTON.

Sworn to before me this 24th day of July, 1876.

[Seal.] JAMES L. KING,
Notary Public.

Endorsed: Complaint filed July 24, 1876.

VAL. D. DOUB,
Clerk.

WM. IRVINE,
Plff. Atty.

County Clerk's Office,
State of California, County of Marin.

I, Geo. W. Davis, County Clerk of the County of Marin, State of California, and Clerk of the Superior Court, do
129 hereby certify that I have compared the foregoing copy of complaint in the case of Samuel R. Throckmorton vs. Ebenezer Wormouth and of endorsements thereupon, with the original records of the same remaining in this office, and that the same is a correct copy thereof, and of the whole of said original record.

Witness my hand and the seal of said Court, this 16th day of February, 1881.

[Seal.] GEO. W. DAVIS,
Clerk.

By DANIEL T. TAYLOR,
Deputy Clerk.

[Map.]
See Original Transcript.

DECISION OF U. S. REGISTER AND RECEIVER.

U. S. Land Office,
San Francisco, Cal'a.
Aug. 11, 1885.

S. R. Throckmorton
vs.
Ebenezer Wormouth.

The records of this office show that S. R. Throckmorton, on October 20, 1880, made application to purchase, under 7th section Act of July 23, 1866, lot 3, section 28, and lots 2 and 3 and southeast ¼ of northeast ¼ section 29, T. 1 N., R. 6 W., M. D. M.

Ebenezer Wormouth filed D. S. No. 10661 December 18, 1874, alleging settlement March 1, 1859, for lot 3, section 28, and lot 3, section 29, same township and range.

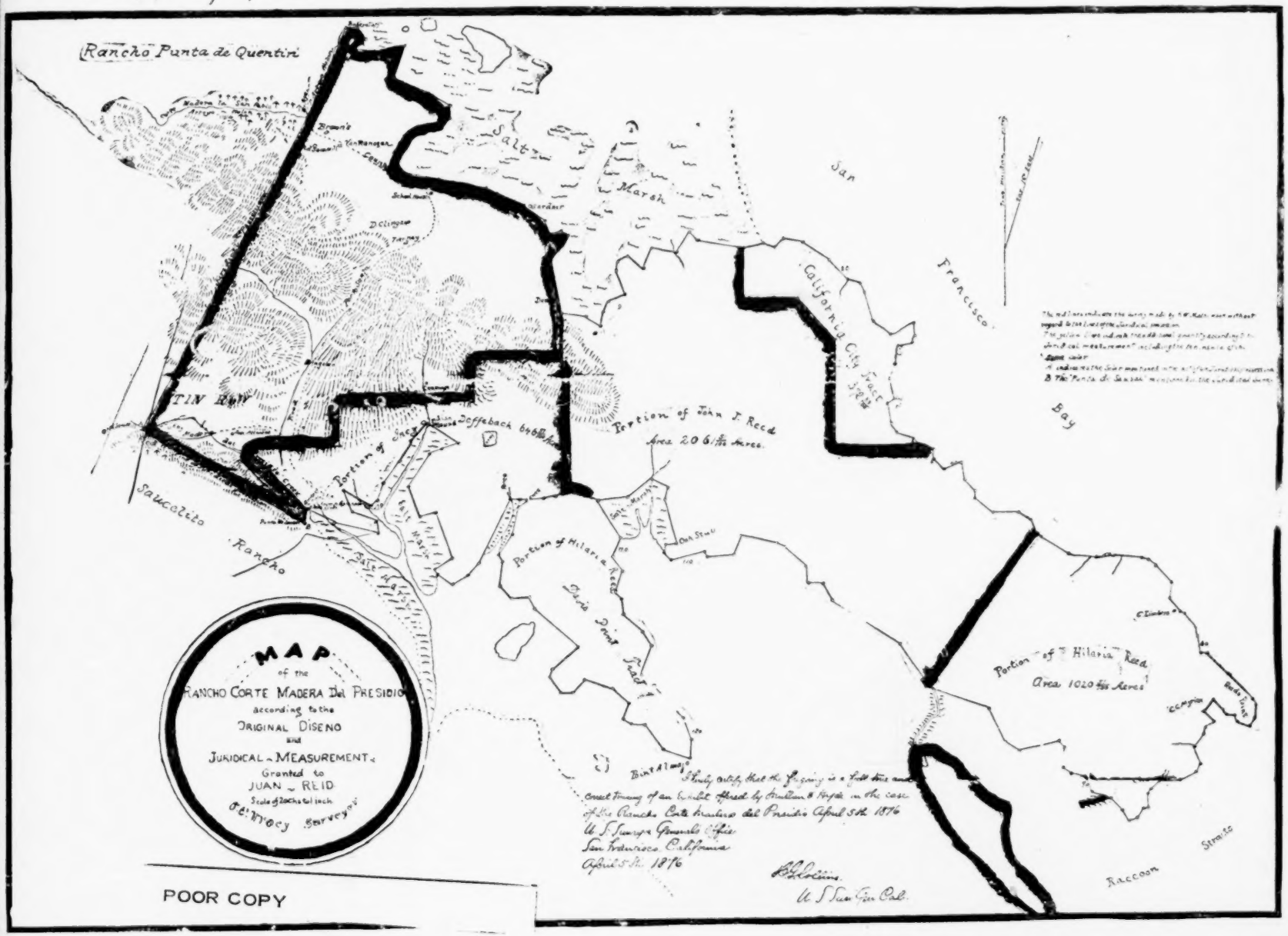
Said filing was decided to be premature and illegal by letter of Hon. Commissioner G. L. O. of Aug. 31, 1880—"G" in case of R. S. Brown.

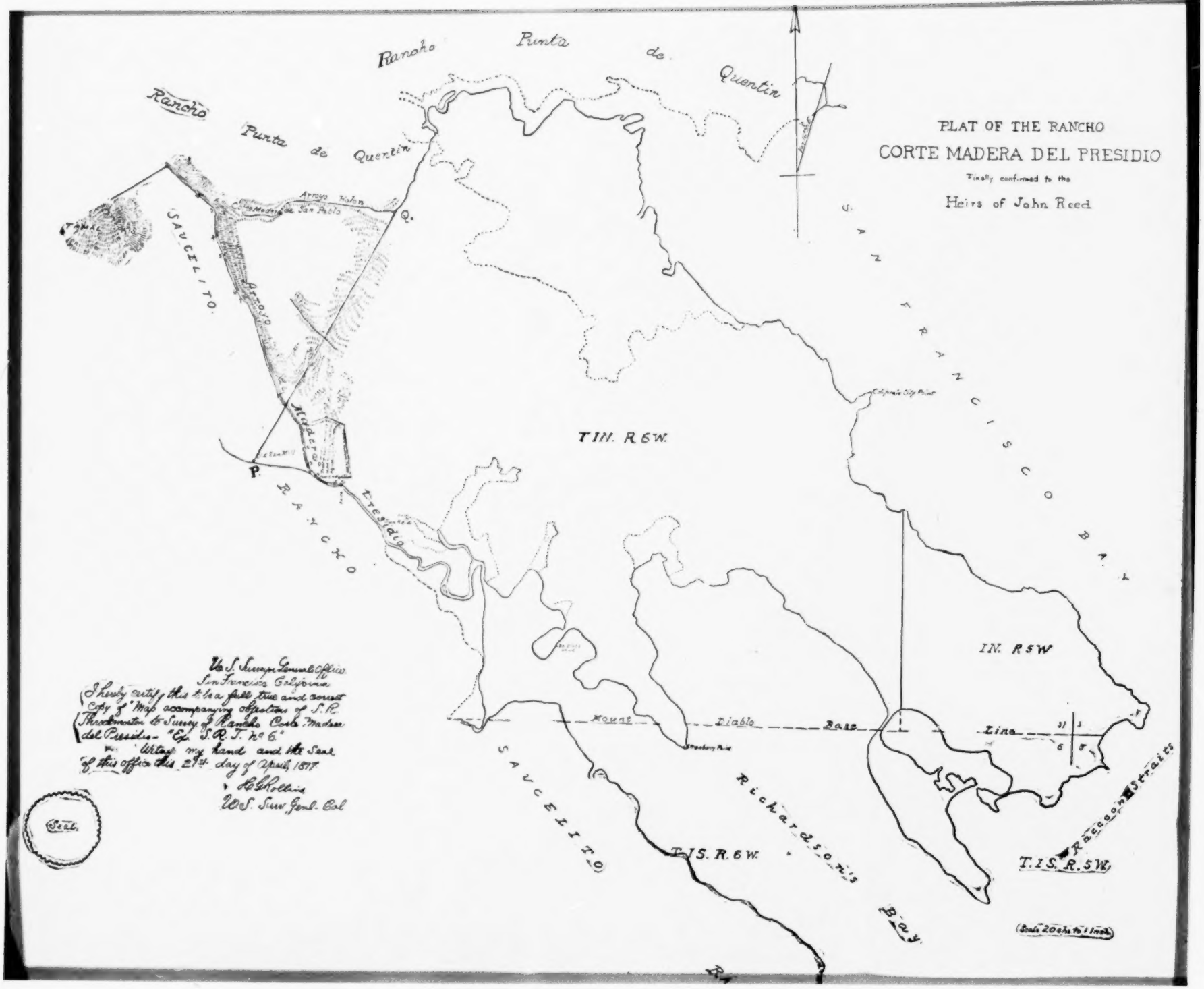
Said Wormouth on September 14, 1880, filed D. S. No. 15517, alleging settlement, March 5, 1859, claiming the same land as in his previous filing. On May 20, 1881, said Wormouth made H. E. No. 4415 upon the same land. Town-
130 ship plat filed December 5, 1874. Sections 16, 17, 20, 21, 28 and 29, suspended March 1, 1875. Suspension removed except as to lots 2 and 3, section 28, and lots 2 and 3 and southeast ¼ of northeast ¼ section 29, August 12, 1875, by letter of Surv'r Gen'l for California of August 7, 1875.

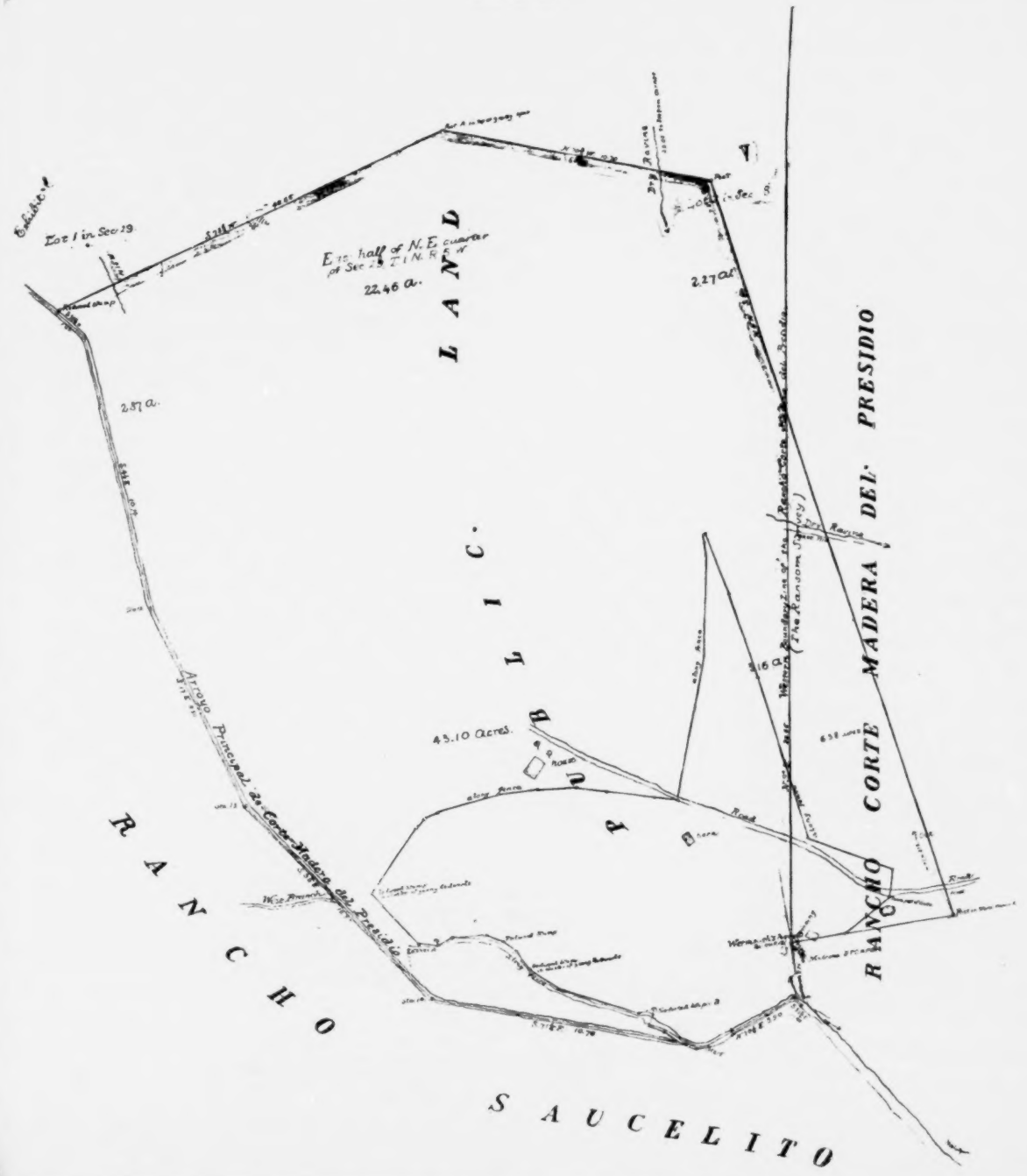
Plat withdrawn from office August 13, 1875, and returned and filed in this office August 2, 1880. The testimony shows that in August, 1865, the heirs of Reed, the Mexican Grantee of the Rancho "El Corte de Madera del Presidio," made a conveyance to one Bolton of one undivided half interest in all land in the said Rancho outside of the Mathewson survey of the same; the consideration being $1.00 and other considera tions.

In June, 1866, Throckmorton purchased from a party holding under Bolton an undivided one-fourth of said rancho, outside of the Mathewson survey. None of the deeds prior to 1866 in the chain of title from Bolton to Throckmorton conveyed any land by specific boundaries or any land but an undivided interest in such land as was included within the "El Corte de Madera del Presidio" outside of the lines of the Mathewson survey.

Ex. No. 2 to Stacys Deposition


Rancho Punta de Quentin
Saltz
Marsh
San
Francisco
Bay
California City Tract
Portion of John T. Reed
Area 206 1/100 Acres
Portion of Hilaria Reed
Area 1020 100 Acres
Saucelito
Rancho
Tin Roof
Doffelbach
Portion of Salt Marsh
Portion of Hilaria Reed
State Drainage Canal
Raccoon
Strait
MAP
of the
RANCHO CORTE MADERA Del PRESIDIO
according to the
ORIGINAL DISENO
and
JURIDICAL MEASUREMENT
Granted to
JUAN REID
Scale of 2 Chs to 1 inch
E. Stacy Surveyor
I Duly certify that the Foregoing is a full true and
Correct Survey of an Exhibit offered by Shelton & Hoyt in the case
of the Rancho Corte Madera del Presidio April 5th 1876
U S Surveyor Generals Office
San Francisco California
April 5th 1876
B Gleeson
U S Surv Gen Cal
The red lines indicate the survey made by W. Reid, some without regard to true bearings and distances
The yellow lines indicate the old lines (some) according to Juridical measurement including the marsh lands
Blue color
A indicates the Clear and Level land
B The Points de Sal are included in the Juridical survey
POOR COPY


PLAT OF THE RANCHO
CORTE MADERA DEL PRESIDIO
Finally confirmed to the
Heirs of John Reed
Rancho Punta de Quentin
Rancho Punta de Quentin
Arroyo Nolan
Arroyo San Pedro
SAUCELITO
Arroyo
Arroyo
Presidio
T1N. R6W.
SAN FRANCISCO BAY
IN. R5W
Mount Diablo Base
Line
SAUCELITO
Richardson's Bay
T.1S. R.6W.
T.1S. R.5W.
Raccoon Straits
(Scale 20 chs to 1 inch)
U.S. Surveyor General's Office
San Francisco California
I hereby certify this to be a full true and correct
Copy of "Map accompanying objections of S.R.
Throckmorton to Survey of Rancho Corte Madera
del Presidio - "Ex. S.R.T. No 6"
Witness my hand and the Seal
of this office this 21st day of April 1877
H.G. Hollins
U.S. Surv. Gen'l. Cal
Seal.


Lot 1 in Sec 19
E ½ half of N.E quarter of Sec 19 T 1 N R 5 W
22.46 a.
227 a.
257 a.
45.10 Acres.
316 a.
RANCHO SAUCELITO
RANCHO CORTE MADERA DEL PRESIDIO
LAND OF B. C. ALLEN

In January, 1875, the various parties holding an interest in the land in said rancho outside of the Matthewson survey joined in a deed to Throckmorton conveying a specific tract, but whether that deed included the land in contest or not is immaterial, since it does not appear that any one of the grantors named therein had any interest in any land not included in the Rancho "El Corte de Madera del Presidio" in July, 1866, or had acquired it from any party who had purchased the land in good faith from the Mexican Grantee or his assigns prior to that date.

Throckmorton's claim must therefore be rejected for the reason that neither he nor his grantors prior to July 23, 1866, had purchased the tract applied for from the Mexican Grantee of the Rancho "El Corte de Madera del Presidio" or from his assigns.

Wormouth in 1859 purchased the improvements of a
131 prior occupant on a tract that included the land applied for with other land since included in the lines of Corte de Madera Grant.

His first house was included within one survey of that grant. He then built another and that was also included in another survey of the same grant. In 1880 he built a third house on that part of his claim that is outside of the grant and on the land in contest. His residence, improvement and cultivation so far have been sufficient to show his good faith and he should be allowed to enter the land on advertising according to law and making final proof.

CHAS. H. CHAMBERLAIN,
Receiver.
WM. R. WHEATON,
Register.

Law Office J. A. Robinson,
509 Montgomery Street, Rooms 3 and 4.
Mining Patents a Specialty.

San Francisco, Cal., August 19, 1885.

To the Register and Receiver of the United States Land Office,
San Francisco, Cal.

Gentlemen: Appeal is hereby taken from the whole of your decision rendered August 11th, 1885, in the case of S. R. Throckmorton vs. Edward Wormouth, to the Honorable Com-

missioner of the General Land Office, Washington, D. C.

Respectfully,

J. A. ROBINSON,
Attorney for S. R. Throckmorton.

ASSIGNMENT OF ERRORS.

1st. The decison is contrary to law.

2nd. The decison is contrary to the evidence.

3rd. The Register and Receiver erred in holding and deciding that S. R. Throckmorton was not a purchaser in good faith under the 7th section of the act of Congress approved July 23rd, 1866.

4th. In holding and deciding that a purchaser under
132 said act must be made prior to date thereof. The Supreme Court of California in the case of Bascom vs. Davis, No. 5824, decided that the Act of July 23rd, 1866, was not only retroactive but intended also to be prospective, and further decided that all statutes should be so construed.

In holding and deciding that S. R. Throckmorton is not entitled to purchase the land applied for by reason of having purchased an undivided interest in the Rancho Corte del Presidio, he having perfected his title by purchase, occupation and possession long prior to the date of issuance of the patent, he is entitled to purchase the land under the Act of July 23rd, 1866. The date of the patent being the time governing in such cases and not the date of the Act of Congress.

6th. In deciding in favor of Wormouth and awarding him the land sought to be purchased by S. R. Throckmorton.

J. A. ROBINSON,
Attorney for S. R. Throckmorton.

State of California,
City and County of San Francisco—ss.

Jacob Gardner, being duly sworn, deposes and says that he is the Grantee in that certain deed dated July 17th, 1890, executed by Susanna M. Throckmorton, which said deed conveys to affiant all the right, title and interest that the said Susanna M. Throckmorton then had or may thereafter acquire of, in and to those certain lots, pieces or parcels of land situate, lying and being in the County of Marin, State of California, and more particularly described as follows, to wit:

Lot three (3) of section twenty-eight (28) and lot three (3) of section twenty-nine (29), township one (1) north, range six (6) west, Mount Diablo base and meridian, containing forty-three (43) acres of land, more or less, being a part of the property conveyed by and described in that certain deed of conveyance made by Julius C. McCeney to Samuel R. Throckmorton, dated the 19th day of February, 1875, and recorded in the office of the County Recorder of said Marin County the
133 24th day February, 1876, in Liber "Q" of Deeds at pages 206, 207 and 208. And affiant further says that ever since the execution of the said deed to him by the said Susanna M. Throckmorton he has been and still is the owner of the right, title and interest of the said Susanna M. Throckmorton of, in and to the property conveyed by and described in her said deed.

JACOB GARDNER.

Subscribed and sworn to before me, this 5th day of September, 1890.

[Seal.] H. A. COBB,
Notary Public.

State of California,
City and County of San Francisco—ss.

I, Wm. A. Davies, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court thereof (which Court is a Court of Record, having a seal), do hereby certify that H. A. Cobb, whose name is subscribed to the annexed instrument and thereon written and before whom the annexed oath or affidavit was taken, was, at the time of taking such oath or affidavit, a Notary Public in and for the City and County of San Francisco, residing in said City and County, duly authorized to take the same, and an officer duly authorized by the laws of said State to take and certify the acknowledgment and proof of deeds to be recorded in said State. And further that I am well acquainted with the handwriting of such officer and verily believe that the signature to such jurat or certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the Seal of the said Superior Court, at my office in said City and County, this 6th day of September, A. D. 1890.

[Seal.] WM. A. DAVIES,
Clerk.

State of California,
City and County of San Francisco—ss.

Jacob Gardner being duly sworn deposes and says that he

is the grantee and owner of the interest of Susanna M.
134 Throckmorton in the property herein after described; that Samuel R. Throckmorton died at the City and County of San Francisco, State of California, on or about the 28th day of May, 1883; that said Samuel R. Throckmorton left a will, dated September 21st, 1880, in and by which the said Susanna M. Throckmorton was named as his sole devisee and legatee; that said Samuel R. Throckmorton at the time of his death was a widower, and that said Susanna M. Throckmorton then was and is his only surviving child and his sole heir at law, that said will was admitted to Probate as the last will and testament of said Samuel R. Throckmorton, deceased, in and by the Superior Court of the said City and County of San Francisco, State of California, on the 27th day of July, 1883, that on the 23rd day of September, 1889, a decree of distribution was made and filed in and by said Superior Court of the said City and County of San Francisco, in the matter of the estate of said Samuel R. Throckmorton, deceased, which decree of distribution distributed to the said Susanna M. Throckmorton in her own right the property hereinbefore referred to and hereinafter more particularly described, to wit: All those certain lots, pieces or parcels of land situate, lying and being in the County of Marin, State of California, to wit: Lot three (3) of section twenty-eight (28) and lot three (3) of section twenty-nine (29), township one (1) north, range six (6) west, Mount Diablo Base and Meridian, and that said affiant is still the owner under Deed of Conveyance from said Susanna M. Throckmorton, of the right, title and interest of the said Susanna M. Throckmorton in and to said property to which she became entitled as the sole heir at law and devisee of the said Samuel R. Throckmorton, deceased, and acquired by her in and by the Decree of Distribution aforesaid.

JACOB GARDNER.

Subscribed and sworn to before me this 31st day of October, 1890.

[Seal.] H. A. COBB,
Notary Public.

State of California,
City and County of San Francisco—ss.

I, Wm. A. Davies, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk
135 of the Superior Court thereof (which Court is a Court of Record, having a seal), do hereby certify that H. A. Cobb, whose name is subscribed to the annexed instrument

and thereon written and before whom the annexed oath or affidavit was taken, was, at the time of taking of such oath or affidavit, a Notary Public in and for the City and County of San Francisco, residing in said City and County, duly authorized to take the same, and an officer duly authorized by the laws of said State to take and certify the acknowledgment and proof of deeds to be recorded in said State. And further, that I am well acquainted with the handwriting of such officer and verily believe that the signature to such jurat or certificate is genuine.

In Witness Whereof, I have hereunto set hand and affixed the Seal of the said Superior Court, at my office in said City and County, this 31st day of October, A. D. 1890.

[Seal.] WM. A. DAVIES,
Clerk.

Annexed to said affidavit of said Jacob Gardner is a certified copy of a deed from Susanna M. Throckmorton of the City and County of San Francisco, State of California, party of the first part, to Jacob Gardner of the County of Marin, State of California, the party of the second part, dated the 17th day of July, 1890, whereby the party of the first part, in consideration of the sum of $10.00 granted, bargained, sold and conveyed to the party of the second part all the right, title and interest that the party of the first part now has or may hereafter acquire of, in and to those certain lots, pieces or parcels of land situate, lying and being in the County of Marin, State of California, and more particularly described as follows, to-wit:

Lot three (3) of section twenty-eight (28) and lot three (3) of section twenty-nine (29), township one (1) north, range six (6) west, Mount Diablo base and meridian, containing forty-three (43) acres of land, more or less, being a part of the property conveyed by and described in that certain deed of conveyance made by Julius C. McCeney to Samuel R. Throck-
136 morton, dated the 19th day of January, 1875, and recorded in the office of the County Recorder of Marin County the 24th day of February, 1876, in Liber "Q" of Deeds at pages 206, 207 and 208.

Duly acknowledged by the party of the first part on the 18th day of July, 1890, before Thomas E. Haven, Notary Public in and for the City and County of San Francisco. Filed for record September 2nd, 1890, in the County Recorder's office of said Marin County, but has not yet been transcribed into the proper record book.

———

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

Washington, D. C., September 22nd, 1896.

I, S. W. Lamoreaux, Commissioner of the General Land Office, do hereby ertify that the annexed copy of the testimony, orders ad proceedings in the case of S. R. Throckmorton vs. E. Wormouth, arising under the seventh section of the Act of Congress approved July 23rd, 1866 (14 U. S. Stat., p. 213). and the maps and exhibits in the said case which involved lands in township one north of range six west of the Mount Diablo meridan in California, is a full, true and literal exemplification and copy of all the said testimony, orders, proceedings maps and exhibits on file and of record in this office, from the commencement of said case to the decision of Lewis A. Groff, Commissioner of the General Land Office, in said case, which was rendered on said testimony on June 18, 1890.

In Testimony Whereof, I have hereunto subscribed my name and caused the Seal of this Office to be affixed at the City of Washington on the day and year above written.

[Seal.] S. W. LAMOREAUX,
Commissioner of General Land Office.

REED PATENT.

Defendants here offered and read in evidence the patent of the United States to the heirs of Juan Reed, dated February 25th, 1885.

137 The patent recites that under act of Congress of March 3rd, 1851, to settle land claims in California, Hilaria Sanches de Reed, widow, and Juan Reed, Hilaria Reed, Ynez Reed and Ricardo Reed, children of Juan Reed, deceased, filed petition on 3rd December, 1852, and on 13th of June, 1854 (same parties omitting Ricardo), filed an amended petition with the Commissioners to ascertain and settle private land claims in the State of California, at San Francisco, claiming confirmation of Rancho "Corte de Madera del Presidio," founded on Mexican Grant to Juan Reed, made on 2nd October, 1834.

Also recites that the said Board of Land Commissioners on the 13th day of June, 1854, in the case "Heirs of Juan Reed vs. The United States," rendered its decree as follows—(here follows a copy of decree of Board of U. S. Land Commissioners hereinbefore set forth in this Bill of Exceptions in the record of evidence before the U. S. Register and Receiver in the contest between Throckmorton and Wormouth).

Also recites that an appeal from said decree was taken to the District Court of the United States for the Northern District of California, and said decision of the Board of U. S. Land Commissioners was modified and affirmed by said District Court on 14 January, 1856.

(Here follows copy of Decree of Confirmation by U. S. District Court as hereinbefore set forth.)

Also recites that notice was given by U. S. Attorney General that no appeal would be taken and that on April 2d, 1857, said District Court ordered that claimants have leave to proceed as under a final decree.

Also recites that the U. S. Surveyor General for California made his return, plat and survey dated March 24th, 1883, reciting that said Surveyor General made a true and correct survey of said tract of land in conformity with the grant thereof and the said decision of said Court. The descriptive notes of said survey, so far as material to this case, are as follows:

DESCRIPTION.

"Beginning at a post marked C. M. P. 181 on the line between sections 28 and 29, T. 1 N., R. 6 W., Mt. Diablo
138 meridian, distant 20 chains north of corner to sections 28 and 29, 32 and 33, from which post the center of a madrone tree four feet in diameter marked B. T. C. M. P. 181, bears S. 24 degrees, E. 87 links distant, this post stands on the place formerly known as the Solar, which 'faces west,' and on the edge of the forest of redwoods called Corte Madera del Presidio, thence according to the true meridian, the variations of the magnetic needle being 16 degrees 30 minutes east, on line between sections 28 and 29, S. 2 chains 45 links to the center of the Arroyo Corte Madera del Presidio, being the northerly boundary of the Rancho 'Sausalito' Station; thence down the center of said arroyo through a dense thicket of willows formerly known as the 'Sausal' S. 33 degrees 45 minutes E. 5 chains 85 links to station.

(Then follows numerous courses and distances, the last two being as follows):

* * * Thence S. 26 degrees 45 minutes W. 15.10 chains to a laurel 24 inches in diameter marked P. Q. 99 station; thence leaves said arroyo and the boundary of the Rancho Punta de Quentin and ascends S. 9 degrees W. at 47 chains top of a high ridge course east and west; a high peak of the ridge bears W. 7 chains 45 links distant and descends at 82 chains, crosses gulch course 81 degrees E. and ascends at 100

chains 50 links top of a ridge, course southeasterly and northwesterly and descends 149 chains 80 links to the post marked C. M. P. 181, the point of beginning, containing 7845.12-100 acres.

"And attached to said survey is a plat of the said rancho as surveyed by the said Surveyor General, and which survey and map do not include the land in controversy within the boundaries of said rancho, and the said patent thereupon gives and grants to the said heirs of Juan Reed, to-wit: John Reed, Hilaria Reed and Inez Reed, their heirs and assigns, a tract, the land embraced and described in said survey.

The following is a copy of so much of said map contained in said patent as bears upon the matters in controversy herein:

[Map.]

139 See Original Transcript.

George M. Dodge was here sworn as a witness on behalf of defendants and testified as follows:

I am a civil engineer and have practiced that profession for many years past and I am familiar with the lines of the Corte Madera del Presidio Ranch and the Rancho Sausalito. I have made a map which shows the Arroyo Holon and the Arroyo Corte Madera del Presidio. It is made from official United States Government surveys. The lines of the Rancho Sausalito and the Rancho Punta de Quentin are shown on the map and also a portion of the Corte Madera del Presidio Rancho.

The 80-acre tract described in the deed from T. B. Deffebach and others to Julius C. McCeney and shown on the map by dotted lines. The map was here offered and admitted in evidence and is marked Defendant's Exhibit "17" and the following is a copy thereof:

[Map.]

Cross-Examination of George M. Dodge.

I have seen the map which is here presented to me and marked Plaintiff's Exhibit "I." It looks very much like a copy of a map I made, but I did not make that map. It is a correct diagram. The dotted lines show Mr. Wormouth's old fence. The boundary line of the Rancho Corte Madera del Presidio is shown there. The Mathewson survey is shown by the red lines. The map was admitted in evidence on behalf of plaintiff and the following is a copy thereof:

[Map.]

See Original Transcript.

Rancho Punta de Quentin
Corte Madera Slough
Small Islands
Arroyo Holon
Post PQ 97
Salt Marsh
Slough
Land
Public
T. 1 N. R. 6 W.
Lot No. 40
Point of Beginning at place formerly known as the Solar
Salt Marsh
Head of Marsh
Sausalito Rancho

16920

120 B

16921

120 C

The Mathewson survey ran due east from "C. M. P. 181" and thence south to the arroyo and then along the arroyo. The most westerly line of the Matthewson survey coincides with the present patented line from "C. M. P. 181" south to the creek. It starts due east, then it runs north, then east and then north. That line is all east of the present patented line. The land in controversy starts at "C. M. P. 181" and runs east. The Mathewson survey went clear around the ranch and was a survey of the Reed Ranch and is all included within
140 the ranch as at present patented. The western boundary of the ranch so far as it was made by Mathewson is contained in the course running from the creek due north to 181. That is a portion of the western boundary of the ranch as patented.

DECISION COMMISSIONER GENERAL LAND OFFICE.

Refer in reply to this initial "D."

Dept. of the Interior, Gen'l Land Office.

W. O. C.
J. R. C.
J. B. L.

Washington, D. C., June 18, 1890.

Register and Receiver,
U. S. Land Office,
San Francisco, Cal.

Sirs:

I have examined the contested case of S. R. Throckmorton vs. Ebenezer Wormouth, forwarded with your letter of February 9, 1886, involving the right of Mr. Throckmorton to purchase under the 7th section of the Act of July 23, 1866 (14 Stats. p. 218), lot 3, section 28, and lots 2 and 3 and S. E. ¼ of N. E. ¼ section 29, Tp. 1 N., R. 6 W., M. D. M., California.

The record shows that on December 18, 1871, Ebenezer Wormouth filed D. S. 18,661, alleging settlement March 1st, 1859, for lot 3, section 28, and lot 3, section 29, same township and range. On September 4, 1880, Wormouth filed D. S. 15,517, alleging settlement March 5, 1859, claiming the same land. On May 20, 1881, the said Wormouth made H. E. 4415 upon the same land.

The seventh section of the act of July 23, 1866, provides:

"That where persons in good faith and for a valuable con-
"sideration have purchased lands of Mexican grantees or as-
"signs, which grants have subsequently been rejected, or
"where the lands so purchased have been excluded from

"the final survey of any Mexican grant, and have
141 "used, improved and continued in the actual pos-
"session of the same, as according to the lines of "their original purchase, and where no valid adverse right or "title (except of the United States) exists, such purchasers "may purchase the same, after having such lands surveyed "under existing laws, at the minimum price established by "law, upon first making proof of the facts, as required in this "section under regulations to be provided by the Commis-"sioner of the General Land Office."

The Rancho Corte de Madera del Presidio was granted by Gov. Figueroa to Juan Read. It was confirmed by the Board of Land Commissioners, June 12, 1854, and is described as follows:

"Commencing from the solar which faces west at a point "at the slope and foot of the hills which lie in that direction "and on the edge of the forest of redwoods called Corte de "Madera del Presidio, and running from thence in a north-"wardly direction four thousand five hundred varas to an "arroyo called Holon, where is another forest of redwoods "called Corte de Madera de San Pablo; thence by the waters "of said arroyo and the Bay of San Francisco," etc., etc., "be-"ing the same land described in the testimonial of juridical "possession on file in this case, as having been measured to "said Juan Read under a grant of the same to him, to which "testimonial and the map therein referred to, and constituting "a part of the *expediente*, a traced copy of which is filed in the "case, reference is to be had."

By reference to the *expediente*, it is found that the Magistrate, in giving juridical possession, commenced at the "Solar, "which faces west, and standing at the slope and foot of the "hills which lie in that direction, and on the edge of the tract "of redwoods called Corte de Madera del Presidio they com-"menced said measurement, and going from S. to N. they "measured to an arroyo called Holon, where is another forest "of redwoods called Corte de Madera de San Pablo, ninety "cordels of fifty varas," thence from this point N. to S. to Point Tiburon, etc.

142 The point of beginning or solar referred to by the Board and in the expediente has been fully identified in the surveys of the rancho by this office and has been marked by a post, C. M. P. 181, and is on the western boundary or limit of this claim. This claim was surveyed in the year 1858 by U. S. Deputy Surveyor Matthewson, and he, in making the

survey, determined the western boundary to be at the solar.

This survey was for quantity (one league) within larger boundaries. Upon examination by this office, this survey was, by decision of May 6, 1871, approved. The Department, on January 6, 1872, reversed this decision and held that the grant was one by boundaries, and not for quantity, that in segregating the same from the public domain it should be surveyed according to the boundaries described in the decree of conformation and grant.

A re-survey was accordingly ordered, and in the months of November and December, 1873, and June, 1874, U. S. Deputy Surveyors Ransom and Allardt executed a survey of this claim, which survey was accepted by this office as properly describing the land as granted. The Ransom and Allardt survey was approved by the department in letters dated July 28, 1882, and January 31, 1883, to this office, and was finally approved as contemplated by the act of July 1, 1864 (13 Stat. 332). Patent issued February 25, 1885.

The solar, or house lot, has been fully identified and recognized as at a point 20.00 chains due north from the corner to sections 28, 29, 32 and 33, Tp. 1 N., R. 6 W., M. D. M.

From this point the survey by Matthewson runs east and south and the survey by Ransom and Allardt runs N. 9 degrees E. to the Arroyo Holon and thence down this arroyo to the bay, etc., and from this solar it runs south to the Arroyo Corte Madera del Presidio and following down this arroyo to the bay, etc. No official survey has ever been made showing the line to be west of that established by Ransom and Allardt. In the record is found a tracing of a private survey made by C. C. Tracy, showing that a line drawn from a point on Corte de Madera Arroyo, called "Old Mills," which throws
143 this western boundary further west, but this survey was never recognized by this Government.

In the suit of Bolton vs. Van Reynegan et al., the land involved is mostly outside of the Matthewson survey, but entirely within the claim as finally surveyed and patented. This case can therefore have no bearing whatever on the application under consideration, as the land involved in Throckmorton's application is entirely outside of the claim as finally approved and patented. And again the claimant refers to the suit of Throckmorton vs. Wormouth in the District Court of the 22nd Judicial District in and for Marin County, California.

In the Bill of Complaint, the land described lies wholly within the patented limits of the Rancho Corte de Madera del

Presidio. Both these cases show that the lands claimed by Throckmorton are within the grant as surveyed and patented.

The survey of Ransom and Allardt has been approved and patented, and shows the exterior boundaries of this claim as granted, the grant claimants have by patent obtained all the land to which they were entitled under the grant.

By reference to the plats of the survey of public lands in Tp. 1 N., R. 6 W., M. D. M., it will be seen that the land claimed lies west of the patented line of the Rancho Corte de Madera del Presidio.

Everything in the case, with the exception of the tracing made by C. C. Tracy, which was a private survey, shows that the land claimed to have been purchased by Throckmorton lies outside of the grant. The land now claimed under the Act of 1866 was never included in a Spanish or Mexican grant, hence was never rejected or excluded as contemplated by said Act of 1866, and is not subject to purchase by him under said Act. By reference to the record in the case, I find that on August 12, 1865, John J. Read and others, heirs of Juan Read, the confirmee, conveyed to James C. Bolton all the undivided ½ of the Rancho Corte de Madera del Presidio not included within the survey of Matthewson of 1858 for 4,460.24 acres. On the same day the parties entered into an agreement with Bolton, which agreement is in the following terms, viz. "Whereas, John J. Reed, Hilaria M. Reed, Thomas
"B. Deffebach and Inez Deffebach, his wife,
144 "have this day executed and delivered to me a
"deed of the undivided *one-half* part of all the rancho
"'Corte de Madera del Presidio,' situate in the County of
"Marin, in the State of California, *which is not included* in the
"survey of the said rancho which was made under instructions
"from the U. S. Surveyor General for the State of California
"by R. C. Matthewson, Deputy Surveyor, in October, 1858, and
"approved by J. W. Mandeville, United States Surveyor Gen-
"eral for California, September 19th, 1859, said approved sur-
"vey containing four thousand four hundred and sixty 24-
"100ths (4,460 24-100ths) acres of land, the said rancho being
"the same which was granted to Juan Reid by the Mexican
"Government. Now, therefore, in consideration of the execu-
"tion and delivery of said deed, I hereby agree with them to
"give my professional services before the Courts of the United
"States and the proper authorities at Washington, and to use
"my best endeavors to procure a patent from the United
"States Government for all the land included in the grant
"from the Mexican Government of the said rancho, without

"any expense or charge whatever to them, excepting the ex-
"pense of a new survey of said land (which they, themselves,
"are to pay), and in case I shall fail to obtain a patent for
"more than is included in the above-mentioned approved sur-
"vey, then I shall procure for them, free of all charges, a pat-
"ent for the land included in the said approved survey," &c.

* * * * * * * *

On October 16, 1865, J. C. Bolton conveyed to R. Steinbach all the undivided $\frac{1}{4}$ part of said rancho.

On March 8, 1866, R. Steinbach conveyed to Emil Steinbach all the undivided $\frac{1}{4}$ part acquired from Bolton.

On June 16, 1866, Emil Steinbach conveyed to Emil Gibson the interest acquired from R. Steinbach.

On June 19, 1866, Emil Gibson conveyed to Samuel R. Throckmorton the interest acquired from E. Steinbach.

On July 25, 1868, J. C. Bolton conveyed to Thos. B. Valentine all the undivided part of said rancho.

On May 11, 1869, John J. Reed conveyed to Hugh A. Boyle all his interest in the Corte de Madera del Presidio
145 rancho, outside of the Matthewson survey.

On May 24, 1869, Hilaria Reed conveyed to Hugh A. Boyle all her interest in said claim outside of Matthewson survey.

On February 1, 1871, Thos. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, T. B. Valentine, H. C. Newhall and Maria G. de Boyle conveyed to Julius C. McCheney a certain tract of land by metes and bounds; this included the land now applied for. On January 19, 1875, J. C. McCeney conveyed the last described tract to Samuel R. Throckmorton.

It will be seen by the foregoing that the interest acquired through Bolton was for an undivided portion of so much of the rancho Corte de Madera del Presidio as could be obtained in excess of the quantity surveyed by Matthewson in 1858.

The survey made by Matthewson contains 4,460.24 acres; the interest of Bolton was for an undivided one-half of so much land as could be obtained in excess of this survey.

The survey of Ransom and Allardt, the finally approved and patented survey, contains 7,854.12 acres, or 3,384.88 acres in excess of the Matthewson survey. The conveyance being for an undivided interest in all the land acquired in addition to the Matthewson survey, the deed could only be effective to the land included in the Ransom and Allardt survey outside of the Matthewson survey, or the undivided one-half interest in 3,384.88 acres.

The Act of 1866 provides "that when persons in good faith "and for a valuable consideration have purchased lands of "Mexican grantees * * * may purchase the same after "having such lands surveyed under existing laws at the mini-"mum price," etc.

There is nothing in the record to show that any of Throckmorton's grantors had any interest in any land not included in the Rancho Corte de Madera del Presidio prior to July 23, 1866, or that they had acquired it from any party who had purchased the land in good faith and for a valuable consideration from the Mexican grantee or his assigns prior to that date. For the reasons stated, the application to purchase under the Act of 1866 must be denied.

146 If Mr. Wormouth is qualified to make a homestead entry, and the land is subject to entry, his application should be allowed.

You will give notice of this decision to the parties in interest, allowing the usual time for appeal under the rules of practice. Respectfully,

LEWIS A. GROFF,
Commissioner.

Service of the within decision admitted June 27th, 1890.

J. A. ROBINSON,
Attorney Heirs of S. R. Throckmorton, Deceased.

Filed June 24, 1890.

DECISION SECRETARY OF THE INTERIOR.

Defendants' attorney here offered and read in evidence the decision of the Secretary of the Interior, dated October 24th, 1891, of which the following is a copy:

Department of the Interior,
Washington,
October 24, 1891.

S. R. Throckmorton
v. Mexican Grant.
Ebenezer Wormouth.
Commissioner of the
General Land Office.

Sir:

I have examined the record in the case of S. R. Throckmorton against Ebenezer Wormouth, involving the right to lot 3, section 28, and lots 2 and 3, and the S. E. ¼ of the N. E. ¼ section 29, T. 1 N., R. 6 W., San Francisco, California.

The land is claimed by Wormouth under his homestead entry, made May 20, 1881.

Throckmorton's claim is based on a purchase from the heirs and assigns of Juan Read, the grantee under a Mexican grant, known as the Rancho *Corte de Madera del Presidio*, which was confirmed by the Board of United States Land Commis-
147 sioners June 13, 1854.

The description in said confirmation was by metes and bounds, as follows:

"The land of which confirmation is hereby made is the same "on which said Juan Read resided in his lifetime; is known "by the name of Corte de Madera del Presidio; is situated in "Marin County and bounded as follows, to-wit: Commencing "at the Solar which faces west, at a point at the slope and "foot of the hills which lie in that direction and on the edge "of the forest of redwoods, called Corte de Madera del Pre-"sidio, and running from thence in a northwardly direction "four thousand five hundred varas to an arroyo called Holon, "where is another forest of redwoods called Corte de Madera "de San Pablo; thence by the waters of said arroyo and the "Bay of San Francisco ten thousand varas to the Point Tabu-"ron, said point serving as a mark and limit; thence running "along the borders of said bay and continuing in a west-"wardly direction along the shore of the bay formed by Point "Caballos and Point Taburon four thousand seven hundred "varas to the north of the Canada and the point of the "'Sausal,' which is near the Estero lying east of the house on "said premises, which was occupied by said Juan Read in No-"vember, 1835, and thence continuing the measurement from "east to west along the last line eight hundred varas to the "place of beginning; containing one square league of land, "be the same more or less; being the same land described in "the testimonial of juridical possession on file in this case, as "having been measured to said Juan Read under a grant of "the same to him."

This claim was surveyed in 1858 by United States Deputy Surveyor R. C. Mathewson. This survey was of quantity and made to approximate one square league and contained 4,460.24 acres.

August 12, 1865, the heirs of Juan Read (original grantee from the Mexican Government) conveyed to one James C. Bolton, a lawyer of New York City, "All the undivided one-
"half part of all the Rancho Corte de Madera del Pre-
148 "sidio . . . which is not in the survey of said

"rancho which was made under instructions from the "U. S. Surveyor-General for the State of California by R. C. "Mathewson." Subsequent to the sale of this undetermined and undivided interest . . . to wit: In November and December, 1873, and June, 1874, . . . a re-survey was made by direction of this Department, which was accepted by your office, and patent issued for the land therein described, February 25, 1885.

The last survey, upon which patent issued, described the grant by metes and bounds, and was intended to conform to the description contained in the original grant by the Mexican Government. This survey contained 7,854.12 acres, or 5,393.88 acres in excess of the Mathewson survey.

It was a one-half interest in this excess that was conveyed to Bolton, and the consideration therefor was his "professional services" in procuring a new survey and patent for all the land thus shown to be embraced in the grant.

June 19, 1866, Throckmorton, through several transfers from Bolton, procured title to an undivided half of Bolton's interest, or an undivided one-fourth interest in that part of the rancho not included in the Mathewson survey.

January 19, 1875, the heirs of Read and their transferees conveyed to Throckmorton, by metes and bounds, the land in controversy, containing between seventy-three and seventy-four acres. This land is not included in the grant to Read as last surveyed, nor can I find from the record that it was included in the Mathewson survey. Throckmorton claims the right to purchase it under the 7th section of the act of July 23, 1866 (14 Stat., 218).

That section provides:

"That where persons in good faith and for a valuable con-
"sideration have purchased lands of Mexican grantees or as-
"signs, which grants have subsequently been rejected, or
"where the lands so purchased have been excluded from the
"final survey of any Mexican grant; and have used, imposed
"and continued in actual possession of the same as ac-
149 "cording to the lines of their original purchase, and
"where no valid adverse right or title (except of the
"United States) exists, such purchasers may purchase the
"same."

It cannot, I think, be seriously contended that the interest acquired by Bolton to the undivided "half-part" of the land in excess of the Mathewson survey that should be acquired by a new survey, is such an interest as would entitle him or

his transferree, Throckmorton, to purchase under said act. His rights, if he has any, must depend upon his purchase of January 19, 1875, in which he purchased by metes and bounds, from the heirs and assigns of Juan Read, the land in controversy, which joins the Rancho Corte Madera del Presidio on the west.

At the date of this purchase the new survey had already been made, and was awaiting approval by this Department, which fact must have been known to Throckmorton, for he had long before acquired title, through Bolton, to an undivided one-fourth interest in the excess that should be procured by the new survey. That survey did not embrace the land in controversy, but formed a part of the eastern boundary thereof; in other words, the land claimed by Wormouth and Throckmorton is immediately west of the western boundary of the rancho, as established by the last survey, which said western boundary, according to the best evidence I can get from the record, is the same as that established by Mathewson. In order that he may be entitled to purchase under said section 7, it must appear that he was a purchaser *in good faith* . . . that is, as I construe it, he must have believed that the lands so by him purchased were within the limits of the grant, as originally defined, where, as in this case, the granted land is described by metes and bounds. If, on a proper survey by the government, the land so purchased should be found to be outside the limits of the grant, he would be entitled to purchase under said section, because he had originally purchased and paid for the land in the honest belief that his grantors had the right to convey.

150 I find nothing in the evidence to convince me that this land was ever occupied, cultivated or improved by Reed, his heirs or assigns, prior to the purchase by Throckmorton. The only evidence of any occupation prior to 1872, other than Wormouth's, is the testimony of Throckmorton himself and his rentor, that as far back as 1857 there was a fence along the southwestern boundary of the land in dispute. Who built the fence, or for what purpose, is not shown in the evidence. It may have been to mark the northern boundary of the Rancho Saucelito, which joins this on the south, or it may have been placed there by some one designing to claim the land from the government, or for many other purposes. The evidence is entirely insufficient to show that Read or his heirs or assigns placed it there either to improve or mark the boundary of their claim.

It is true that in 1872, prior to his purchase, Throckmorton enclosed the land with a fence, and has been grazing the same ever since, except about fourteen acres included in Wormouth's house lot. He claims that this was done in pursuance of an amicable partition, setting apart his interest, the deed to which was made by the several grantees to one McCeney, and by him conveyed to Throckmorton, January 19, 1875.

It is shown in evidence that at the time Throckmorton commenced to enclose this land (1872) he was notified by Wormouth (who was there residing on the land) of his claim thereto.

The evidence on the part of Wormouth shows that he has made his home on the land ever since 1859, and that at that time and ever since the land was understood in the neighborhood to be government land and was never supposed to be included in the grant to Read.

The evidence shows beyond the shadow of a doubt that at the several dates at which Throckmorton's interests attached, the boundaries to this grant were in dispute, and that he purchased with full knowledge of the unsettled condition of the boundaries. His first purchase of an undivided half of Bolton's interest was made on speculation, and de-
151 pended for its value on a change in the boundaries as established by the Mathewson survey. His purchase in 1875 of the land in controversy was made before these boundaries had been finally established and with full knowledge of that fact, as well as the claim of Wormouth.

Section 7 of the act referred to was not, in my judgment, intended for the protection of such a purchaser, but applies only to a purchaser who buys relying on the boundaries as generally accepted and supposed to be the correct ones, and which afterward, by the final survey, are found to be incorrect, whereby his land is shown to be outside the grant, and affords no protection to one who buys knowing that the boundaries are in dispute, and that a new survey has already been ordered to determine the true boundaries. Such a purchaser must abide the result of the survey and cannot and should not be allowed to claim the right to purchase land under said act that has for more than twenty years been occupied, claimed and improved by a settler and claimed under the government land laws. But, aside from the speculative character of this purchase, an examination of the record history of this grant satisfies me that Throckmorton is without a

plausible pretext to be considered an innocent and unsuspecting purchaser.

The grant, as shown by the *expediente*, was described by metes and bounds, and was in no sense of the word a float to be located somewhere within defined exterior boundaries.

In the petition of Juan Reed to the General of the Territory of Upper California, the land is described as "*El Corte de Ma-*"*dera del Presidio* to the *Punta del Tiburon*, as shown by the "sketch or plan which your Excellency has in your posses-"sion." In the grant itself it is described as, "Known by the "name of Corte de Madera del Presidio as far as La Punta del "Tiburon, bounded by the Mission of San Rafael and the Port "of San Francisco, the proper measures and examinations be-"ing *previously* made as required by laws and regulations."

In the measurement made by the Alcalde, when
152 juridical possession was given to the grantee, the grant is described as starting from a "forest called Corte de "Madera del Presidio, a little brook with a willow thicket, "and the remains of a rancheria called 'Anamus,' thence con-"tinuing the examination and view of said lands they (the "witnesses) led me *north* to another arroyo and forest of red-"wood trees, called also Corte de Madera de San Pablo, and "they said it was the boundary with the pueblo of San Ra-"fael, and thence continuing the examination as far south as "Point Tiburon, which they said was the limit in that direc-"tion, we continued to the west to the Point Estero, which "empties in the bight formed by the said Point Tiburon and "Point Caballos on the south, and which ends at the entrance "of said Canada, where is situated the house of the owner of "said lands, Don Juan Read, the arroyo, willow thicket and "forest of redwood trees, named Corte de Madera del Presidio, "aforesaid, which they said was the last boundary of the said "lands pertaining to the rancho referred to of Corte de Madera "of Senor Read."

The description in the confirmation heretofore given starts from the same point, the "forest of redwoods called Corte de "Madera del Presidio, running thence in a *northwardly* direc-"tion four thousand five hundred varas to an arroyo," etc. Thus, it will be seen that in the expediente, the grant itself, the measurement in the juridical possession and in the decree of confirmation by the United States Commissioners, the land is definitely described as fixed and determined.

In all the measurements and surveys, including the

Mathewson and the last approved survey, the starting point was identical and was on the western boundary of the grant, thence invariably either north (as in the juridical measurement), or northwardly (as in the confirmation description), to an arroyo (stream) called Holon, thus showing that the western boundary of the grant from the starting point to the Holon was a straight line, and so could not have followed the meanderings of the Arroyo Corte de Madera del Presidio, along which the ancient fence was situated, as claimed
153 by Throckmorton.

These measurements and surveys, except the last one, were of record when Throckmorton's rights attached, and I can not find that the western boundary was ever in dispute, certainly the land in question was never included in any measurement or survey from which it was excluded by a subsequent one, which was finally approved.

I find that the land in question has always been public land, and has never been regarded by disinterested people as being included in the grant to Read, and that Throckmorton, when he purchased the land in controversy, either knew or had good reason to believe that the land was not included in said grant, and that he was therefore not a *bona fide* purchaser within the meaning of the Act of July 23, 1866 (14 Stat., 218).

The decision of your office, denying his application to purchase under said act, is accordingly affirmed, and the papers are herewith returned.

Very respectfully,

GEO. CHANDLER,
Acting Secretary.

EBENEZER WORMOUTH.

Ebenezer Wormouth was then called and sworn as a witness on his own behalf and testified as follows:

I am the plaintiff in this case; I know the land in controversy; I hold United States patent for it; I settled there first, on the 5th of March, 1859; I went there to live and kept a house there; I was living there on the 20th of May, 1881, at the time I made this homestead entry.

Plaintiff's counsel then offered in evidence a certified copy of the entry in the United States Land Office, showing that E. Wormouth entered the land as a homestead entry on the 20th day of May, 1881; and also offered a certified copy of a certificate of purchase from the United States, dated July 22nd,

1892, showing that said Wormouth had paid the purchase money for the said land under the said entry.

154 The following is a copy of said certificate of purchase:

No. 18789. Land Office
at San Francisco, Cal.
July 22, 1892.

It is hereby certified that, in pursuance of law, Ebenezer Wormouth of Mill Valley, P. O., in Marin County, State of California, on this day purchased of the Register of this office the lot three (3) of Section twenty-eight (28) and lot three (3) of Section No. twenty-nine in township No. one North of Range No. six west of the M. D. Meridian, containing 46 and 26-100 acres, at the rate of one dollar and twenty-five cents per acre, amounting to fifty-seven dollars and eighty-three cents, for which the said Ebenezer Wormouth has made payment in full as required by law.

Now, therefore be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Ebenezer Wormouth shall be entitled to receive a patent for the lot above described.

JOHN F. SHEEHAN,
Register.

Across the face of said certificate is written in red ink the words and figures "H. E. No. 4415 of May 20, 1881, commuted."

Indorsed, No. 18789, Cash Entry, Land Office at San Francisco, Cal., Sec. 28 and 29, Town. 1 N., Range 6 W., M. D. M.
EBENEZER WORMOUTH.

H. E. No. 4415.
Lot 3 of Sec. 28 and lot 3 of Sec. 29.
Filed May 20, 1881.
Patented Aug. 14, 1893. (Duly certified.)

Plaintiff's counsel then offered in evidence the Receiver's receipt to the said Wormouth, of which the following is a copy:

No. 18789. Receiver's Office
at San Francisco, California,
July 22nd, 1892.

155 Received from Ebenezer Wormouth of Marin County, California, the sum of fifty-seven dollars and eighty-three cents, being in full for the lot 3 of Sec. 28, and lot 3 of Sec. 29, in T. No. one North, Range 6 West, M. D. M., contain-

ing forty-six acres and twenty-six hundredths at $1.25 per acre.

T. B. SHANNON,

$57.83 Receiver.

Across the face of said paper is written in red ink the words and figures: "Commuted H. E. No. 4415 of May 20, 1881."

(Witness resuming.)

My patent is dated the 14th day of August, 1893. It was here admitted by counsel that the defendants were in the adverse possession of the land described in the complaint, except parcels "A" and "B" described in the answer, ever since the 1st day of February, 1891, without plaintiff's consent.

(Witness resumed.)

I am and have been in possession of part of this land since 1859. I bought out one Samuel Warren and what interest he had there, and everything he had in the way of improvements on that piece of land, and some chickens and hay; there was a house on it that he lived in; I bought that house; it was a shanty; I bought the whole thing; I got a quit claim for it, but I did not get it on record, and when my house was burned it was burnt up with it; the diagram marked plaintiff's exhibit "I" shows the lands described in the complaint; the land I had possession of from 1859 to 1891 is shown by the dotted lines on that map; I had afterwards some more enclosed above the road: down to 1891 those dotted lines show it; now the black line shaded yellow shows lot 3 in Sec. 29 and lot 3 in Sec. 28, 46 acres and some hundredths; the land I am suing for is the part of lot 3, Sec. 29, and lot 3, Section 28, outside of that fence, and shown by the dotted lines; the house I bought from Sam Warren was a little house west of what is now the ranch line of the Corte Madera del Presidio; I lived in that house at the time I settled there; it was east of the Mathewson survey, the first house there, and then afterwards that was burnt up and I built one just inside of the Mathewson survey; the
156 red line shows the Mathewson survey; that must have been the one that was inside of the Mathewson survey and it does not show the one that was burned up; the one that was burned up was a little inside of that; there is a little corner of that house that crossed the Mathewson survey about six or eight inches and all the rest of it is on the west side of what was then the Mathewson survey.

Q. How was it used or claimed at that time? Was it used or claimed by the Reed heirs or anybody claiming under them?

A. Not at that time, because there were lots of settlers on

it, and they claimed it and lived on it and raised cattle on it and cultivated it some. Sam Warren did not claim to be holding by virtue of any lease or title under the Reed heirs when I bought him out; all he paid was a certain amount for stumpage; that was about 1858, or maybe 1857; on the 1st of March, 1859, he went to New York; he said he had a right to the land as government land; I never cut wood to pay stumpage; when I was working I worked by the month for other people; I never paid rent to the Reeds, and Sam Warren succeeded George Cook and he never paid any rent because I lived with him and worked with him and knew all about it; the house I got from Sam Warren was burned down about 1861 or 1862; about 5 or 6 months after that I built that other house that is marked on the diagram right north of the Mathewson survey; I went to live in that and I had my fence all the time on those dotted lines; there was an old barn on the land; I afterwards put up the present barn that is there now; I bought the old barn and the whole thing; the old one blew down and I put up another on the same place 23 years ago; I built another house in 1880 on the west side of the patented line of the Reed Ranch; I have occupied that house ever since, and I have since built another house on the same land; I remember entering this land as a homestead in the United States Land Office by the entry that was read in evidence here; I was living on the land when I made the entry; I am a native born citizen of the United States and was living there with my wife and
157 have been living in that little house on the west side of the rancho 36 years, and have never been out of possession of that land and am still living there; the barn might be 200 or 150 feet from the westerly line of the Reed Ranch as patented. I went there for the purpose of making my home when I made my entry in the United States Land Office. I cultivated and dug up a portion of the land and cleaned off a lot of redwood stumps. It was as much as five or six acres and maybe more that I cleaned up before the time of my homestead entry. The improvements I put there, up to the time of the homestead entry, were of the value of about $500.00; they cost that. I cultivated the place for several years and then afterwards I pastured on it. I raised chickens and kept all the stock I could afford to keep. My fencing was sufficient to turn stock. I have been using that land in various was since 1859. I am not in possession of the land that is outside of my fence.

It was here admitted by counsel that plaintiff was kept out

of possession by Peter Gardner and Jacob Gardner, and that they are in possession of all the land, except the parcels "A" and "B" described in defendant's answer.

(Witness resuming.) Defendants are in there without my consent or permission. I have asked for the possession which parcels are shown by the dotted lines on plaintiff's exhibit "I."

Cross-Examination of E. Wormouth.

Sam Warren, from whom I bought this land, was there in 1858 and went away in 1859.

Q. As I understand you, he didn't pay any rent but paid stumpage?

A. He paid stumpage for wood he cut, but he cut on what is now the Sausalito Ranch.

Q. Didn't he cut on this property?

A. No. There was no wood on this property; it had been all cut off.

I never endeavored to take possession of the land which the defendants are in possession of; I was always waiting until this land was surveyed by the government so as to
158 know what was government land, so I could file on it, and as soon as it came to that I filed on it, and then Throckmorton commenced his contest, and I remember that he fenced up the land outside before any survey was made, and I informed him that I owned and claimed that land and intended to pre-empt; I could not get the possession from him; I did not want to fight for the possession; I thought I would get it in a legal way when the land came into the market; when he first built the fence I guess was in 1872 or 1873; that was the time I gave the notice, when he was fencing.

Re-Direct Examination of E. Wormouth.

Mr. Throckmorton up to 1872, when he built that fence, had never claimed or disputed my possession there; he never made any claim to this land to me until he got those deeds, pretending he bought them from those parties and went to fence up; he did not make any claim to the land so far as I know until he commenced making those fences; he never made any demand on me for anything or asserted any ownership of the piece of land described in my patent until he put that fence up; then he did not have any ownership of it; I was in possession; as soon as he began to inclose this land I gave him notice.

Q. Do you know of any acts of possession that he asserted there over the land that is now in your patent?

A. No more than having his tenants or some of them turn stock there on it; they lived on the other side of the creek on his ranch.

Q. Were they tenants specially of this particular piece of land?

A. No; they were not tenants living there at all. Those tenants lived on the Sausalito Ranch.

Re-Cross-Examination of E. Wormouth.

I was examined in this case when it was first tried. I suppose my testimony then was that I couldn't get possession of this land from Throckmorton, because he fenced right ahead of me and got outside of my measurement before the land came into market. That testimony was correct. I will
159 tell you that he fenced around outside of me before that land was surveyed by the Government and before I knew anything about where the section lines were he took possession before any Government plats were filed. Then Throckmorton put another fence. I forgot what time that was put there. It was on the west side of the Blythedale road. I don't remember the date of it, but it must have been 18 or 20 years ago. The township maps, offered by counsel for plaintiff, are considered in evidence for what they are worth, by consent.

The plaintiff here rested upon the equity branch of the case.

The said equity branch of the case was then argued and submitted to the Court for decision, thereafter on the 8th day of March, 1897, the Court made and filed its decision and findings thereon (see findings on equity issues ante page ——)

LEGAL ISSUES.

Stipulation.

The following stipulation was made onthe 4th day of January, 1897, by counsel for the respective parties and entered in the minutes of the Court, to-wit:

[Title of Court and Cause.]

By consent of the plaintiff and defendants by their respec-

tive attorneys in open Court, the demand of the defendants and each of them for a jury as to the issues made by the cross-complaint and answer thereto in the above entitled actions and in each of them is withdrawn, and on like consent of the parties, plaintiff and defendants herein respectively, in open Court. It is ORDERED that each and all of the issues made or raised by the pleadings of the respective parties to the above entitled actions and on file therein, shall be tried by the Court sitting without a jury, excepting only the issues as to the damages claimed by the plaintiff and as to the value
160 of the rents and profits of the land in controversy which are to be tried by a jury if required by either party.

This action came regularly on for trial upon the issues formed by the complaint and the defendant's answer thereto before the Court with a jury on the 19th day of April, 1897. A jury of twelve men were duly empaneled in said case.

E. WORMOUTH.

E. Wormouth, the plaintiff, was sworn in his own behalf, and testified as follows:

I am the plaintiff in the case and know the land in controversy. I am 74 years old and am a native of the State of New York and have been in possession of part of that land since the 1st of March, 1859. I was living there with my wife on the 20th day of May, 1881. Counsel for plaintiff here offered and read in evidence the homestead entry made May 20th, 1881, being the same in this bill of exceptions before mentioned and described.

Witness resuming. I remember making that homestead entry. It is not all enclosed. It is for the same land I settled upon in 1859. I was living there with my family when I made that entry.

Counsel for plaintiff here offered and read in evidence the certified copy of the Register and Receiver's receipt for the purchase price of the land, being the same receipt and which is in this Bill of Exceptions set forth.

Witness resuming. That is a receipt for the same land upon which I settled in 1859, and upon which I am on now. I am in possession of a part of it.

Counsel for plaintiff here offered in evidence a duly certified copy of the certificate of purchase for said lands, being the same hereinbefore set forth in this Bill of Exceptions.

That is a receipt for the same land; I am the man that paid

for it; I am the person spoken of as Ebenezer Wormouth.

The land described in the complaint is the same described in these papers that have been introduced in evidence;
161 in 1859 I got into possession of that land by buying out a man named Sam Worn that lived there; he had a house and improvements on it; I bought all his right, title and interest in and to all those things he had there; I went on there as a settler; I settled there; I don't know how it turned out; I didn't know whether it would turn out to be United States land or anything else; there had been no surveys made then; it turned out to be United States land; then there was a survey made in 1858 and that was thrown out.

This map (Plff's Exh. 1) exhibited to me shows the land described in the complaint; the land that I have been in possession of from 1859 down to 1891 is shown by the dotted lines; there is a road cutting it in two; that yellow line is the outside boundary of the piece of land described in the Certificate of Purchase; it is the whole 46 acres; that is the piece (indicating) that I am in possession of, and I have had possession of that ever since I got it from Worn; the defendants, Peter Gardner and Jacob Gardner, have withheld possession from me of this piece of land outside of the dotted lines from February, 1891, down to this time without my consent, and they are still withholding it from me; they certainly refuse to give me possession; the piece that I am suing for is not the piece that I am in possession of; there (indicating) is the house where I am living; I put that house up myself; I put a barn up two or three years ago; this piece of land lies between the Reed Ranch and the Sausalito Ranch; the Sausalito Ranch is a big ranch of 19,000 acres; the Reed Ranch has some three thousand acres; the line of the Reed Ranch as patented runs from there (indicating on diagram) N. 9 degrees east; here (indicating on diagram) is lot three in Section 28, and here (indicating) is lot three in Section 29; I have lived in that vicinity since 1859; it is on the east side of the boundary line of the Rancho Sausalito.

I know what that land has been renting for—for camping purposes and so on—for dwellings and other things.

The space a tent would occupy depends on the size of it; 15 by 20 feet; some 12 by 14; I guess 12 by 14 would be an average size, maybe more; the sizes of the tents used over there
162 were different; I don't suppose they averaged over 10x 12; I could not tell exactly what the actual receipts from that land were; I think the rental value of that land oc-

cupied by the Gardners and belonging to me would be worth $50.00 a month from the first of February, 1891, or $500.00 a year; it is about 32 acres or thirty-three; I never saw the Gardners collect rent or either of them, but I am pretty sure they got it of all the campers that were there; there were campers there in the summer season; '93 was the biggest summer; '92 was not so big; I am reading from a paper that I made myself; I could not remember all the tents that were there, and that is the reason I made a memorandum of it; by looking at this paper I can refresh my memory; I made the memorandum in another paper in my book and then I put it on this; it was sometime after I made the memorandum in the book that I put it in this; I have not an original memorandum here; that is the same as the original; it is a copy of it; I have not got the original at home; it is wornout, I guess; I wrote it with a pencil, and then I wrote it over.

In 1893, in the best time, there was 65 or 70 tents there.

I have been kept out of possession from the 1st day of February, 1891, down to the present time. I am out of possession.

Cross-Examination.

I have looked at this map [indicating], and I think that you have looked at it, too. At present that line where your finger is, marked boundary line of the Rancho Corte Madera del Presidio, north nine degrees east, as patented to the Reed heirs February 25th, 1885, that the line represents the patented line of the Rancho Corte Madera del Presidio. The western boundary and the land lying east of that is the land as patented by the United States to the Reed heirs. I first went there in March, 1859. The house that I went and lived in was on land that was patented to the Reed heirs. It was Mexican grant lands, but all of that has been adjudicated by the Land Department. I was living on the east side of this grant line, as patented in 1859, March of that year. I don't remember when I got a lease from Miss Throckmorton, but I didn't get a lease from her for any portion of that land. It is this little corner
in here [indicating]. That was on the grant land; she
163 was the daughter of S. R. Throckmorton, so they say;
they told me so; I don't know when it was I got that lease. I lived on the grant land as patented until 1861 or 2; then the house was burned up. Then I built another one. The second house was on the northwest side of the grant line—the west side of it. The house marked on the map "Wermouth's old house" was the house I built in 1861; that was after the

first one burnt down. Both of those houses were not on the grant line at that time. The Mathewson survey was made—before that survey was made. I couldn't tell you how many years I lived in the second house—in 1881 or '80. On the previous trial of this case, when I was examined as a witness, I am pretty sure I didn't say that I was living on the grant land when I filed my homestead entry on this land. I built that house [indicating] in 1880. I don't think I testified that I built that house when I filed my homestead claim.

Q. Do you remember that the Judge of this Court asked you on your examination in 1885, when you were a witness in this case, the direct question whether you were living on the grant land or whether you were living on government land when you filed your homestead claim, and did you not, in reply to the Judge, say that you were living on the grant land at that time?

A. I don't think so.

Q. On this trial of a case between Mr. Gardner and yourself, which took place on the 12th day of November, 1892, was this question not asked of you?

[Counsel reads:]

"Q. When did you discover for the first time by an actual "survey that the house that you resided in with your family "was not on the land which you now claim?

"A. I could not tell you the year.

"Q. About what year?

"A. I guess maybe ten years ago, more or less; I could not tell exactly."

Was that your testimony, then?

[Judge Mahon.] That is the testimony before the 164 land office.

Q. [Mr. Wilkins.] Did you testify in this way:

[Counsel reads.]

"Q. [The Court.] I want to ask you if you can recollect "any more clearly when you first lived on any of this land "west of the grant land?

"A. [The witness.] I built a house directly after filing a "homestead. I lived right in there three years right along."

Q. Was that your testimony?

A. It may be something like that.

[Counsel reads.]

"Q. After you filed the homestead?

"A. That is, in 1881: around there."

Was that your testimony?

A. It might have been. Then after that I filed the homestead again—after that again.

Q. And then you built the house?

A. I couldn't tell whether I built the house before or after.

Q. Didn't you testify that you built the house afterwards? The testimony here is: "I built the house directly after filing the homestead." Now, I want to know if that is so or not.

A. If I said so, then it must be so. I may have built the house before I filed the homestead.

Q. Did you not testify as follows: "I built a house directly after filing a homestead. I lived right in there three years, right along." Is that not your testimony?

A. Somewheres near that; somewheres like that. I could remember then; better then than I could now. I am certain I think that is correct. I never had possession of the remainder of this land—the 33 acres; but I filed on it and Throckmorton built a fence around it. I never had possession at all of this 32 acres of land which lies outside of the patented line; it was always withheld from me after I got my legal papers.

Mr. Throckmorton first had possession of it; he took possession.

I don't know how many years he had possession, but
165 when he went to fence it I informed him and notified him that I claimed that land. I don't recollect the day of S. R. Throckmorton's death; he died somewhere previous to the decision of the Commissioner in the Land Office. After his death, Miss Throckmorton held possession of it.

This is ordinary land; the same as the general land around here. It is level, with nice oaks through it. It has a natural slope in it; it slopes down toward the creek. I know the land Mrs. Boyle claims to be hers; it adjoins this. I don't know how much per year Mrs. Boyle rents her property for. I know the land owned by the Deffebach heirs; that is further down; farther down.

It is next to Mrs. Boyle's and runs down to the County Road. I think there are somewheres around five or six hundred acres there. I don't know how much that land rents for. I know what I have been offered for my land. I know where Dr. Warner's land is; it is right next to Mrs. Boyle's land; I couldn't tell how many acres there are there; I suppose 160, more or less. I don't know the rental value of the land; I wouldn't give much of anything for it myself. I don't know the rental value of Mrs. Boyle's land only what I have heard

it has rented for. I never hired any land or rented any; I know what I could have got for my place if I had possession of it. Mrs. Boyle's land is adjoining mine; it is further back. It depends on the location a good deal; if that piece of land I own was forty or fifty miles from here, up in the hills, it wouldn't be worth anything; the Shelley tract has five or six acres; Mrs. Boyle's comes along there on the same county road as mine; it is between Alto Station and Mill Valley; Mrs. Boyle's property has hills and trees on it, but it isn't so near to town; some of it has plenty of water on it, and some of it ain't. It is not near Millwood Station; I couldn't tell how far her property is from Millwood Station, but there is a piece of land between, and a road; I don't know that they have a roadway reserved in the deed by which they can get through the property; it is all fenced; they don't always cross there; a man could cross that property on foot and climb a barbed wire fence; there are no gates.

166

Re-Direct Examination.

That line (indicating the red line on plaintiff's map Exh. 1) is what is known as the Matthewson survey; that is, a survey of the Reed Ranch that was made in 1858 or '59. After I bought from Worn, there were the improvements upon the land that I claim—a barn was there and all the fencing was there. The first house was there. After the Mathewson survey was made, that took in the house that I bought from Worn. That burned up, and then I put up that one there (indicating). That was outside of the Mathewson survey on public land, then; that was in 1861, or somewhere along there. Then I built a house on the west side of the Reed Ranch line that is patented.

When I built the first house there, I was under the impresson that it was public land, because it was surveyed out by Mathewson and laid that way for several years; the Mathewson survey of the Reed Ranch excluded this (indicating). I lived in that second house for quite a number of years and then built another house where they changed that survey. When they changed the survey and made it run north nine degrees east, then I built on the west side of the Reed Ranch westerly line. That was about '80. That is the way I remember it now. That was all in the same inclosure I had originally in 1859.

The map was here put in evidence and marked "Pl'ff's Exh. 1."

The 46 acres tract means all of this piece (indicating) that is included in my certificate of purchase; that whole piece is included in what I call the homestead entry; I have been living in this house (indicating) from 1880 or thereabouts—1881 anyway; there is another house that I built before I built this one (indicating) that is in here; this on the east is the Reed Ranch, and the place that I have been living on from 1881 down to the present time is on the west side of the boundary line of the Reed Ranch, and on this land that I bought from the United States.

167 The piece of land that I leased from Susanna Throckmorton is not included in any of the land that is described in my certificate of purchase—not an inch of it.

This is the road leading to Mill Valley; it used to be called the Blythedale road, but it is a county road now; there is a creek along this line, here (indicating). This is the Mathewson survey (indicating). There is station 181 and 180; all of this (indicating) at that time was considered public land; afterwards they surveyed this land over here and threw it into the Reed Ranch, cutting off a piece of this public land.

Q. All that you are suing for and all that is described in your certificate of purchase was public land?

A. Yes, sir.

When I first filed Mr. Throckmorton started this contest. He pretended he wanted and claimed the land as an innocent purchaser, from the Reeds, Bolton, Deffebach and a good many others. I filed another entry and afterwards I disregarded that, and I filed my homestead. Both entries that I made were for that same land. It was a United States homestead entry filed in the United States Land Office in San Francisco.

Re-Cross-Examination.

That (marking on diagram on board) is the house that I bought in 1859; that was burned up in about '61 or '62, and then the Mathewson survey was made, and then I bought one, right somewheres in there (marking). That was on the grant land. There is a fence along here (indicating). It was a good rail fence at that time. Throckmorton went and built a picket fence outside of it, and then I didn't fix the rail fence, and then Gardner had campers around there and they stole the fence and burnt it up.

GRANT OF JURIDICAL POSSESSION.

Defendants' counsel here offered and read in evidence the Mexican grant from Jose Figueroa, Governor, of the
168 Rancho Corte Madera del Presidio, the petition for said grant by Juan Reed, and the testimony of juridical possession, all of which papers are before mentioned, described and set forth in this Bill of Exceptions. And in addition thereto, the following act of juridical possession and measurement by the Constitutional Alcalde Haro, to wit:

Being in the field and lands pertaining to the Rancho Corte de Madera del Presidio of Juan Reed, Saturday, the 28th day of November, 1835, I, the Constitutional Alcalde of the Port of San Francisco di Assis, acting in virtue of my office, with two assisting witnesses, for want of a notary public, present citizen Jose Antone Galindo and the Indian Neri, appointed measurers by the parties and by the colindantes, I ordered them to proceed with the measurement of one square of land which, a little more or less, pertains to the Rancho Corte de Madera, according to the title and the map presented, in obedience to which, having again measured and examined the rope, they commenced said measurements from the solar which faces west and standing at the slope and foot of the hills, which lie in that direction, and on the edge of the forest of redwoods called "Corte de Madera del Presidio" they commenced said measurements, and going from the south to the north, they measured to an arroyo called Holon, where is another forest of redwoods called "Corte de Madera del Pablo" 90 cordeles of 50 varas, and the person interested, fixing there a known point as a mark, said that he placed a bound; from this point, taking a direction from north to south, the measurement was continued to Point Tiburon and they measured 200 cordeles and the said point, serving as a mark and limit, he promised to place there a corresponding bound. Thence, continuing the measurement, from east to west to the mouth of the canada and the point of the Sausal, which is near the estero, lying east of the house of person interested, which is at present on the rancho; there were measured 94 cordeles, and from this last point continuing the measurements from east to west along the last line to the place of beginning, they
finished by measuring 16 cordeles, so that the square
169 league of land which the Rancho Corte de Madera contains forms a square, a square of twenty thousand Castilian varas, which, being regulated by said measurers, they

declared citizen Juan Reed to be informed of the lands which belong to his ranch according to the title and map at the head of this expediente, so that no third party is injured.

Wherefore, said citizen, Juan Reed, pulled up various herbs and stones and threw them to the four winds in sign of his legal and legitimate possession; and at this period the Constitutional Alcalde ordered said Reed, for permanence and clearness of the boundaries which have been mentioned, to make, at his own cost and expense, bounds of masonry more than a vara high, that it might in all time appear, they be observed and kept as limits and boundaries of his lands by the others, neighbors thereto. And he prayed for a testimony that the said measurements were made quietly and peaceably without contradiction by any person, and I, the Constitutional Alcalde for the Port of San Francisco, acting in virtue of my office, with two assisting witnesses, for want of a notary public, give it, that everything was done as has been said, and that the aforesaid measurements were executed to the best of the knowledge and understanding of the said measurers as they deposed without deceit or fraud against any other person; and for greater security and the ratification of the oath which they have made, they did not sign, not knowing how, and those who knew how and were present did so before me and those of my assistants.

[Signed.] FRANCISCO DE HARO,
MANUEL SANCHEZ,
JOSE DE LA C. SANCHEZ,
FERNANDO FELEZ,
THOMAS JEREMIA JONES.

Attesting Witnesses:
EUCEBIO GALINDO,
FRANCISCO SANCHEZ.

STIPULATION.

176 (Admitting in Evidence All Documentary Evidence in Evidence in Equity Branch.)

It was here stipulated and agreed by and between counsel for plaintiff and defendants, that all the documentary testimony that was received upon the trial of the equitable issues shall be considered as before the Court; that portion of it that was offered by the defendants to be here considered as offered by them, and that portion that was offered by the plaintiff to be considered here as offered by plaintiff.

PETER GARDNER.

Peter Gardner was then called and sworn as a witness in defendants' behalf and testified as follows:

Direct Examination.

I am one of the defendants in this action. I first knew the land in controversy in 1852 or 1853. That was the time when I first came to Marin County. I have known the land ever since. I have examined the Mexican Grant, the testimony of juridical possession, and all these papers and documents relating to the grant. I commenced that examination in about 1865. I became familiar with them at that time. I know the terms of this Mexican Grant. I erected improvements upon this land in controversy. I erected a house, and I did some fencing over there. At or about the time of the erection of that house, I believed that this land was within the boundaries of the original grant from the Mexican Government to Juan Reed. My opinion at that time was that the Corte Madera del Presidio Creek constituted the western boundary of that grant. (Witness here points out location of creek on the desino from the Mexican archives of the grant.) I know the Arroyo Holon on the other side. The sources of the Arroyo Holon and the Arroyo Corte de Madera del Presidio are not very far apart. According to my judgment of the construction of that grant the Arroyo Holon constituted the northern boundary of that grant. (Witness here explains to the jury from
171 said desino.)

I went into possession of that land under my brother Jacob Gardner. The house I put on that land cost a little over $600.00. Tht was built before the commencement of this suit, in the year 1890 or 1891—it was built in '90—after the deed from Miss Throckmorton to my brother Jacob Gardner. I fenced all along up the creek with wire fencing; that cost about $15.00.

I knew the claims which S. R. Throckmorton had made to this land. I understand and knew the chain of title from the Reed heirs to S. R. Throckmorton at that time. They all claimed this land as part of the Corte Madera del Presidio Ranch, and my brother and I claimed it in the same way. During the year 1891 to the present time I have been familiar with the rental value of that land. I should say $150.00 a year was a fair rental.

The house I built on that land was a 20x14, 12-foot studding, rustic with awning all around it. It is not all finished inside. There are three rooms finished at present. A portion of it is not partitioned off. It is a one-story house. It has a tongue and groove 1x6 flooring around it. I am living in this house at this time. There was a couple of other houses on that land which I erected.

I never did any other fencing except what I mentioned.

Cross-Examination.

On the 12th of May, 1885, I was a witness for Mr. Throckmorton before the Register and Receiver—I should say, for Mr. Wermouth, when he was making his homestead proof.

[Counsel here reads as follows]:

"Peter Gardner being called as a witness in support of the "Homestead Entry of Ebenezer Wermouth for lot 3, section "28, and lot 3, section 29, township 1 north, range 6 west, "Mount Diablo Meridian, testified as follows:

"Q. What is your occupation and where is your place of "residence?

"A. I am a farmer and reside in Marin County, Cali-
172 "fornia.

"Q. 2. Have you been well acquainted with "Ebenezer Wermouth, the claimant in this case, ever since he "made his Homestead Entry No. 4415?

"A. Yes, sir.

"Q. 3. Was claimant qualified to make said entry? State "whether the settler was a citizen of the United States, over "the age of 21 years, or the head of a family, or whether he "ever made former homestead entry.

"A. Yes, sir. He was over 21 years of age; a native-born "citizen of the United States. He was a married man, had a "wife; never made a former homestead entry to my knowledge.

"Q. 4. When did claimant settle upon the homestead and "at what date did he establish actual residence thereon?

"A. Prior to 1860; went there to reside prior to 1860. He "has a house 20x12 feet, a barn 30x12, chicken houses, sheds "and some fencing, total value about five hundred dollars.

"Q. 5. Have claimant and family resided continuously "on the homestead since first establishing residence thereon?

"A. I think so. I have been away for about two years. "He was living there when I went away and I found him there "when I returned.

"Q. 6. For what period or periods has the settler been "absent from the land since making settlement, and for what "purpose, and, if temporarily absent, did claimant's family "reside upon and cultivate the land during such absence?

"A. Not any that I know of.

"Q. 7. How much of the homestead has the settler culti- "vated, and for how many seasons did he raise crops thereon?

"A. About five or six acres; raised a crop for several "years; he grubbed about five or six acres and raised a crop on "that; used it since for pasturage.

"Q. 8. Are there any indications of coal, salines, or min- "erals of any kind on the homestead? If so, describe what "they are, and state whether the land is more valuable for "agriculture than for mineral purposes.

173 "A. Not that I know of.

"Q. 9. Has the claimant mortgaged, sold or con- "tracted to sell any portion of said homestead?

"A. Not that I know of.

"Q. 10. Are you interested in this claim, and do you "think that the settler has acted in entire good faith in per- "fecting this entry?

"A. Not any; I think so.

"[Signed.] PETER GARDNER."

Q. That is your testimony given on that occasion?

A. [The witness.] Yes, sir. I had no interest in this land in controversy at that time.

[Counsel read as follows]:

"Continuance of Direct Testimony of Peter Gardner by "Mr. Stuart.

"Q. Please examine the map Exhibit 'C' Throckmorton "and find out where, if you can, Wermouth's first, second and "third houses were and are located thereon, if you know, if "any such houses have been located thereon and now being "on the land?

"A. The one shown on this map is the second house; the "first was burned down; it stood a few feet south of this one; "the third house is not shown on this map; the third house is "about 100 or 150 feet northwesterly from the second house "across the yellow line shown on this map.

"Q. Do you know what this line would indicate?

"A. It is the enclosure of Wermouth marked 'long fence.'

"Q. Do you know whose barn that is marked 'barn' within "that enclosure?

"A. Yes, sir; it is Wermouth's

"Q. Is the line of the Rancho Corte Madera del Presidio "now marked as the western boundary line of said ranch the "line of the survey of that ranch when Wermouth located his "first two houses, and, if not, please state how far or where "the said line came?

"A. That line was not run when Wermouth built his first "two houses.

"Q. Were not the land on which these two houses were "built considered public lands at the time these houses were "built?

174 "A. Yes, sir."

Q. Is that correct?

A. Yes, sir.

In 1865 I was acquainted with the location of that grant as shown on that desino.

Q. Now, then, you don't mean to contradict the testimony that you gave there that the western boundary line of the rancho at that time extended over to this creek here that you spoke of?

A. No, I don't mean to contradict it; there is something I would like to explain about the location of those little houses on that line. The Mathewson survey was made and they throwed this (indicating) off as public land.

Q. I want to know, if you knew that land in 1865, whether you thought at that time that the line of the Reed Ranch extended over here instead of here (indicating)?

A. The survey didn't, but the grant did. I said it was marked as public land. At the times these two houses were built the lands on which they were built were considered public lands, and it was so marked on the public surveys.

At the time the deed which is in evidence was executed and delivered to Jacob Gardner by Miss S. R. Throckmorton I was familiar with the proceedings in the land office about this land. I knew at that time that there had been a contest before the Register and Receiver of the land office about this land between Throckmorton on the one side and Wermouth on the other; I knew that the contest was going on. I knew the Register and Receiver had decided in favor of Mr. Wermouth; I knew that there had been an appeal taken by Mr. Throckmorton from that decision to the Commissioner of the General Office, and that the Commissioner of the General Land Office had again decided in favor of Mr. Wermouth. That was before I put up any improvements. I put up the improvements shortly after the date of the deed.

When these two houses were built that public land (indicating) was over there; this (indicating) was also considered public land.

175 I remember testifying that there was eight hundred or a thousand yards of space between the sources of the Arroyo Holon and the Arroyo Corte de Madera del Presidio, and that there is a ridge running between them. I pretty near finished it then. I put up on partition one time and another another. Somewheres along in '92 or '93 I put up little additions to it. I know the decision of the Secretary of Interior that was rendered in October, 1891. This house was finished before the decision of the Secretary of Interior.

Re-Direct Examination.

Q. In testifying in the land office as to this land being considered as public land, did you refer to the surveys, or did you refer to the original grant of the land?

A. I referred to the surveys. I meant to say that it had been so surveyed by the authorities and declared public lands.

Q. Did you have any different opinion ever then than you have to-day in relation to where the lines of that Mexican grant were?

A. When I made that discovery—the full discovery of this thing by me came on in the contest in the Surveyor-General's office the same time they were trying to set aside the Mathewson survey. I think it was about '76; I am not sure; it was the time that contest was going on. I refer to the discovery about the location of the Mexican grant as I have testified to here. I was trying, also, to give an explanation about where they first located those houses. At that time the fence was run to what I call a madrone tree. At that time the madrone tree was a bearing tree, and I understood by running the fence to the line, they run to the bearing tree.

From that time I never changed my mind or opinion as to where the true line of the Mexican grant was. I can not remember the date exactly, but to-morrow morning, when I have a chance to look at some papers, I can tell exactly.

JACOB GARDNER.

176 Jacob Gardner was then called and sworn as a witness in his own behalf and testified as follows:

I am one of the defendants in this case. I am the same per-

son who was mentioned in the deed from Susanna Throckmorton to Jacob Gardner. I have known the land in controversy since 1867. I have had charge of it for the last ten years for Mr. S. R. Throckmorton—during the last ten years of his life. He died in 1883. I had charge of it after his death.

During his lifetime Boratras had charge of it. I acted as agent for Mr. Throckmorton. I took charge of all his land occupied by his tenants and this land came under my supervision as well. He had this land leased to Boratras. I did not take charge of that portion.

When I purchased the land from Miss Throckmorton, I believed she was within the Mexican grant from the Mexican Government to Juan Reed. I heard Mr. S. R. Throckmorton during his lifetime say that he claimed that land under the grant of the Mexican Government. I don't know as I ever heard her (Miss Throckmorton) say one way or the other as to her claim. I have read these Mexican grant papers and had read them before my purchase.

At the time I purchased from her and at the time this house was constructed upon this property I supposed this land was within the exterior boundaries of the Mexican grant. I have ever since entertained that belief. I know the house that was erected by defendants in, I think, the year 1890. I should say, in my judgment, that that house is worth about $500.00.

I have been engaged in renting lands there and collecting rents since '68 with the exception of five years that I was absent somewheres. I have been familiar with the rental lands in Mill Valley. From the first of February, 1891, to the present time I have been familiar with the rental value of this land in controversy. In my opinion the rental value of that land is about $15.00 a month; that is, from the first day of April down to the present time. All the year round.

Cross-Examination.

I am one of the defendants in this case. The deed from Miss Throckmorton to me is dated July 17th, 1890. That
177 deed includes also the fifteen acres that Mr. Wermouth has possession of, and which he has been in possession of since 1859. I knew at the time I purchased this land that Mr. Wermouth was living on a piece of it, and claiming it; that he claimed this 46 acres. His barn was built there afterwards; there was a little shed there. The barn was not on that place, it was on another place; it was on a portion of the

Mathewson survey; that is, on the west side of the boundary of the Reed Ranch. There was a barn there when I went there. There was a barn there when I bought in 1890; that barn was there about 1862, and that is a part of this same property.

I knew that he filed an entry in the United States Land Office about May 18th, 1881, for this same property. I knew there was a contest between Mr. Wermouth and Mr. Throckmorton about this same land; I knew that the matter had been heard before the Register and Receiver and that he had decided in favor of Mr. Wermouth. I think the Mathewson survey was made before I came to California.

I knew the Mathewson survey didn't include the land in controversy.

I also knew that an appeal had been taken by Mr. Throckmorton from the decision of the Register and Receiver to the Commissioner of the General Land Office at Washington and that the Commissioner had decided in favor of Mr. Wermouth.

I also knew that a final survey of the ranch had been made and that a patent issued for it in 1885. I knew that the Reed Ranch line didn't take in any of this land. Mr. Throckmorton died in 1883 and his daughter succeeded him. It was from her that I bought this land. If I was successful, I was to pay her $100 an acre; and if I wasn't successful I was not to give her anything. So far, I have not given her anything to speak of. I know land situated near Mill Valley and of half as good quality as this that will rent for $15.00 an acre; that is Boyle's place; it is adjoining this. It is not quite as near as this land. This place lies between them and the station. It is about the same character of land; if anything, it is better land. I
178 arrive at the conclusion that it is only worth $15.00 a month by the land adjoining. I don't know what my brother collects; I own 28 acres and I know what I get for that. I know whatever he got he kept. I rented land for camping purposes, but not on this land. I am adjoining it. I have 28 acres north of it near Cushing's. My land is pretty hilly. I saw lots of tents there. I don't know how many. I don't believe my brother 1800 or 1893 of that land.

Re-Direct Examination.

I saw the tents west of the county road. I suppose four or five acres was used for tents. The tents stood all over in different places.

On the 20th of May, 1881, I think Mr. E. Wermouth was living on patent land, that is, the land patented to the Reed heirs. This house was on that land.

Re-Cross-Examination.

I know that his house in 1881 was not where it is now; it was on the patent line at that time. I don't know who he bought the house from that he lived in. I knew him as early as '59. That (indicating) was the house he was living in. That house was on what is now a part of the Reed Ranch.

Q. Now, there was another house built there in 1861 or 2?

A. I don't know. I wasn't there in 1861 or '2. I didn't go there until 1867. He was living in that house (indicating) in '67 until he built the one which he is living in now.

He built a small house 12 by 12; he lived in one of the houses part of the time and in the other the other. He built a house on the west side of the ranch line. The small house was about fifty feet from the house he was living in in 1867. All of these houses were close together. There was no enclosure at that time. There was an enclosure all round the whole property. It wasn't put there by Wermouth. It was property that he was exercising acts of ownership over; he claimed it to be his house, his barn and his place. He was occupying that.

He built that house (indicating) about the time he
179 moved from the ranch proper; it was about '80 or '81.

Five or six months he would be in one and then in the other; moving backwards and forwards in one and then the other. One was on the east side of the ranch line and one was on the west.

The final line was not established until 1885. He was occupying it, moving backwards and forwards all the time. He was in one or the other of these two houses and was within the general enclosure that he had there.

Defendants here rested.

The foregoing is the testimony given in the case on both branches thereof, material to the exceptions taken by defendants, and the exceptions and objections of the defendants on the ground of insufficiency of evidence relied on by defendants herein.

The case was thereupon argued by counsel for the respective parties, and the Court instructed the jury as follows:

FINDINGS ON LEGAL ISSUES AND INSTRUCTIONS TO JURY.

In this action the plaintiff, Ebenezer Wormouth, seeks to recover from the defendants, Jacob Gardner and Peter Gardner, the possession of certain land, with damages for its detention since February 1st, 1891.

The land in controversy is the 46.26-100 acre tract described in the complaint, excepting therefrom the two parcels described in the answer, of which two parcels it appears the plaintiff was at the time of the commencement of the action and ever since has been in possession.

The plaintiff alleges that he was on February 1st, 1891, and ever since has been the owner and entitled to the possession of the land in controversy, which is denied by defendants.

It has been duly stipulated between the parties to this action that all of the issues made by the pleadings in this action shall be tried and determined by the Court sitting without a jury, excepting only the issues as to the damages
180 claimed by plaintiff and as to the value of the rents and profits of the lands in controversy, which are issues to be determined by you.

Determining the issues to be disposed of by it, the Court now finds the following facts from the evidence introduced on this trial, viz:

1st. That on the 1st day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26 chains, more or less to the creek on the eastern boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of Section 28, and lot 3 of Section 29, township No. 1 north of range No. 6 west, M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments

and appurtenances thereunto belonging or in anywise appertaining.

2nd. That on said 1st day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except those portions thereof bounded and described as follows):

"A"-- Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwesterly along said fence to the said creek; thence descending the said creek to the point of beginning.

181

"B"—Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of the said Blythedale road; running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of said rancho; thence along said fence north 8 degrees 10 minutes west 514.5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence; thence along said fence running at an acute angle south 8 degrees 30 minutes west 277.5-10 feet; south 16 degrees 55 minutes west 143.7-10; south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.

And ever since has been wrongfully and unlawfully withheld and still withold the possession thereof from plaintiff.

The above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs you that your verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, i. e., all of the said 46.26-100 acre tract described in the Complaint. Save and except the two parcels thereof which are now in plaintiff's possession.

Counsel for the defendants thereupon, before the jury retired, excepted in open Court to the following portions of the instructions to the jury, to-wit:

1st. To that portion of the instructions in which the Court instructed the jury that on the 1st day of February, 1891, the

plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of the land described in the plaintiff's complaint and also described in the said instruction.

182 2nd. To that portion of the instructions in which the Court instructs the jury that the above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs the jury that their verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, i. e., all of the 46.26-100 acre tract described in the complaint, save and except the two parcels thereof which are now in plaintiff's possession.

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL.

On the 27th day of April, 1897, and within the time allowed by law, the defendants served and filed their notice of intention to move for a new trial, of which the following is a copy:

[Title of Court and Cause.]

To E. B. Mahon, Esq., and
L. D. McKisick, Esq.,
Attorneys for Plaintiff.

Please take notice that the defendants above named intend to move and will move the above-entitled Court to set aside and vacate the decision of the Court, the verdict of the jury and the judgment heretofore entered herein and to grant a new trial of said action, and a new trial of all of the issues made by the cross-complaint of the defendants and the answer thereto of the plaintiff and the supplemental answer of said defendants, and all the issues determined and decided by the Court upon the plaintiff's complaint, and the answer of the defendants thereto, and all the issues submitted to and determined by the jury in said motion, and that said motion will be made upon the following grounds, to-wit:

1st. Insufficiency of the evidence to justify the decision of the Court in said action.

2nd. Insufficiency of the evidence to justify each of the decisions of the Court in said action.

3rd. Insufficiency of the evidence to justify the verdict of the jury in said action.

183 4th. That the decision of the Court in said action is

against law, and that each of the decisions of the Court therein is against law, and that the verdict of the jury in said action is against law.

5th. Errors of law occurring at the trial and excepted to by the plaintiff.

6th. Misconduct of the jury.

7th. Excessive damages appearing to have been given under the influence of passion and prejudice.

Said motion will be made on a Bill of Exceptions to be hereafter prepared, served, settled, allowed, signed and filed as provided by law and upon affidavits.

HEPBURN WILKINS,
Attorney for Defendants.

Thereafter, in due time, the defendants served their bill of exceptions on their motion for a new trial and on their appeal from the judgment herein.

Specifications of Insufficiency of Evidence.

The defendants now specify the following particulars in which the evidence is insufficient to justify the decision and findings of the Court upon the issues formed by the cross-complaint of the defendant, Jacob Gardner, and the plaintiff's answer thereto, and the supplemental answer of the defendants herein—and upon which defendant will rely upon their motion for a new trial and their appeal from the judgment herein, to-wit:

1st. The evidence is insufficient to justify the second findings of the Court to the effect that one of the questions decided by the United States Register and Receiver and confirmed by the United States Commissioner of the General Land Office and by the United States Secretary of the Interior, in the contest of Throckmorton vs. Wormouth, mention in the 20th paragraph of said cross-complaint, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed, and there is no evi-
184 dence to support said finding.

2nd. The evidence was insufficient to justify the third finding of the Court that the officers of the United States Land Department, to-wit: The Register and Receiver, the Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact upon the evidence produced before said Register and Receiver upon said contest,

was not included in said original grant by the Mexican Government to Juan Reed, and there is no evidence to support said finding.

3rd. The evidence is insufficient to justify that portion of the fifth finding of the Court, in which it is found that the consideration paid by J. Clinton Bolton to the Reed heirs (John J. Reed and others) for the deed to him of 1865, was not a money consideration, and that the only consideration which passed from said Bolton to said grantors was the agreement by said Bolton mentioned in said fifth finding, and there is no evidence to support said finding.

4th. The evidence is insufficient to justify the sixth finding of the Court to the effect that the officers of the United States Land Department, to-wit: The United States Register and Receiver, the Commissioner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in the said contest of Throckmorton vs. Wormouth, in denying said application of Throckmorton, did not base their decision upon a question of law alone, but did find and decide as a fact that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, but on the contrary the evidence showed that the said officers of the United States Land Department based their decision in the said contest upon a question of law alone and did not find and decide that the said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns and there is no evidence to support said finding.

5th. The evidence is insufficient to justify and there is no evidence to suport that portion of the seventh finding of the Court, wherein it is found that the rancho granted by
185 the Governor of California under the Government of Mexico to Juan Reed, did not include within its exterior limits the land described in the deed from T. B. Deffebach et al., to Julius C. McCeney, of February 14th, 1871, or any part thereof, except so much as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al.; and the evidence is insufficient to justify and there is no evidence to support that portion of said seventh finding wherein it is found that the grant mentioned in the first paragraph of said cross-complaint did not include any part of the land in controversy in this action, and that no grant ever made by the Mexican Government to Juan Reed or to his successors in interest, included any part of the land described and granted to the plaintiff by the United States

patent mentioned in the 22nd paragraph of said cross-complaint.

6th. The evidence is insufficient to justify and there is no evidence to support the eighth finding of the Court to the effect that the land described in said deed from T. B. Deffebach et al., to Julius C. McCeney, or any part thereof, except as in the seventh finding of the Court set forth, was not within the exterior boundaries of said Mexican grant.

7th. The evidence is insufficient to justify, and there is no evidence to support, that portion of the ninth finding of the Court to the effect that the consideration mentioned in the fifth finding of the Court was the only consideration for the deed mentioned in the said ninth finding.

8th. The evidence is insufficient to justify, and there is no evidence to support, that portion of the tenth finding of the Court in which it is found that neither T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle nor H. C. Newhall, did, on the 1st day of February, 1871, or at any other time, own, or was or were entitled to convey to any one, any of the land described in the 16th paragraph of said cross-complaint, except a small part thereof which is described in said tenth finding.

9th. The evidence is insufficient to justify and there is no evidence to support that portion of the eleventh finding
186 of the Court, which is to the effect that Julius C. McCeney, on the 19th day of January, 1875, or at any other time, was not the owner and was not entitled to convey any of the land mentioned and described in the deed from said McCeney to said Throckmorton, described in said eleventh finding, save and except the portion of said land which lies within the boundary of said Reed patent.

10th. The evidence is insufficient to justify and there is no evidence to support that portion of the twelfth finding of the Court, which is to the effect that none of the grantees named in the deeds mentioned or referred to in the 18th paragraph of said cross-complaint, purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy except as trespassers upon the possession and rights of the plaintiff as alleged in his complaint in this action, and that neither the said Throckmorton or his executrix ever had any right to use or improve any part of said lot 3 in Section 28 or of said lots 2 and 3 in Section 29, and neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof except as intruders and tres-

passers upon the rights and possession of the plaintiff.

And the evidence is insufficient to justify and there is no evidence to support that portion of said twelfth finding which is to the effect that said grantees and each of them and particularly the said Throckmorton, did not believe in good faith or at all believe that all of the lands conveyed by the said deeds or any part or parcel of said lot 3 in Section 28 and said lots 2 and 3 in said Section 29, were included within the said Mexican grant, and that said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3, in section 28, and lots 2 and 3, in section 29.

11th. The evidence is insufficient to justify the following portions of the thirteenth finding of the Court, to-wit:

(a) It is insufficient to show and there is no evidence to show that the evidence introduced in the matter of the application and contest mentioned in the nineteenth para-
187 graph of said cross-complaint did not show without conflict, that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true, but, on the contrary, the evidence did show that all of said facts mentioned were true.

(b) It is insufficient to show and there is no evidence to show that the evidence introduced in the matter of said application and contest did not establish all of said facts or any material fact in favor of said Throckmorton's right to purchase said land by competent, or any, evidence, and that there was conflict in said evidence, and that there was evidence on said contest that contradicted said Throckmorton's evidence, and that the evidence alleged in said cross-complaint was not true, but, on the contrary, said evidence did establish all of said facts in favor of Throckmorton's right by competent evidence and without conflict, and there was, in fact, no evidence of said contest which contradicted Throckmorton's evidence, and it fully appeared from the evidence that all the evidence, as alleged in said cross-complaint on said contest, was true.

(d) It is insufficient to show and there is no evidence to show that the Register and Receiver of the Land Office at San Francisco did not, nor did either of them, on the 9th day of February, 1866, or at any other time, based their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict, but, on the contrary, the evidence fully shows that said Register and Receiver did, on the said 9th day of February, 1886, base their

and his decision fully and precisely upon the evidence as the same is alleged in said cross-complaint and upon evidence without conflict.

(e) It is insufficient to show and there is no evidence to show that the Register and Receiver did not, nor did either of them, rest their or his decision upon the proposition or upon a proposition, of law, that the said Throckmorton was not in law, or under the law, entitled to purchase the said land, and that the Commissioner of the General Land Office, on
188 appeal from the decision of the Register and Receiver, upon the, or upon a, proposition of law in deciding that Throckmorton was not entitled to purchase the said land, and that the said Secretary of the Interior did not rest his decision affirming the decision of the Commissioner of the General Land Office, upon the, or upon a, proposition of law, and that the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of Throckmorton vs. Wormouth, that said Throckmorton was not a bona-fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint, but, on the contrary, the evidence showed that each of the said officers of the Land Department, to-wit: the Register and Receiver, the Commissioner and the Secretary of the Interior, based his decision and each of said respective decisions upon the proposition of law to-wit: the proposition that upon all the facts set forth in said cross-complaint, which were duly established before said officers, and each of them, the said Throckmorton was not in law, or under the law, entitled to purchase the said land.

12th. The evidence is insufficient to justify and there is no evidence to support that portion of the fourteenth finding of the Court, which is to the effect that the said Throckmorton was not a bona-fide purchaser from Mexican grantees or their assigns, and was not entitled to purchase the said land or any part thereof under said act of Congress, and that the Register and Receiver of said Land Office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow plaintiff to make proof and payment for the said land, but on the contrary, the fact was and the proofs before said officers showed without conflict that said Throckmorton was a bona-fide purchaser from Mexican grantees and their assigns and was entitled to purchase the said land and every part thereof under said act, and the Register and Receiver of the Land Office did, contrary to law, basing their de-

cision on an erroneous construction of the law appli-
189 cable to the case before them, allow the plaintiff to
make proof and payment for said land, and hold in substance that all of the facts set forth in the cross-complaint herein did not entitle said S. R. Throckmorton to purchase said land.

13th. The evidence is insufficient to justify ,and there is no evidence to support that portion of the fifteenth finding of the Court, which is to the effect that said Susanna M. Throckmorton was not the owner of the said land when she executed the said deed and that she was not entitled to convey the same to said Gardner.

14th. The evidence is insufficient to justify and there is no evidence to support that portion of the sixteenth finding of the Court which is to the effect that Jacob Gardner did not on the 17th day of July, 1890, or at any other time, enter into the possession of said land under said deed or remain in the possession thereof except an an intruder and trespasser.

15th. The evidence is insufficient to justify and there is no evidence to support the seventeenth finding of the Court to the effect that said Jacob Gardner is not and never was the owner in equity of said land or any part of the land described in plaintiff's complaint in this action and which is also described in the United States Patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22nd paragraph of said cross-complaint, and that said plaintiff does not hold said land or any part thereof in trust or otherwise or at all for defendant, Jacob Gardner.

The defendant further specifies the following particulars in which the evidence is insufficient to justify the decision and findings of the Court as contained in its instructions to the jury upon the issues formed by the plaintiff's complaint and the defendants' answer thereto on which defendants will rely on said motion for a new trial and appeal, to-wit:

1st. The evidence is insufficient to justify and there is no evidence to support that portion of the findings of the Court contained in said instructions, in which the Court finds that on the 1st day of February, 1891, the plaintiff, Ebenezer Wor-
mouth, was and for a long time prior thereto had been
190 the owner of and in the possession of and entitled to
the possession of and from thence hitherto has been the owner of and entitled to the possession of the land described in the plaintiff's complaint and also described in said instructions.

2nd. The evidence is insufficient to justify and there is no evidence to support that portion of the findings of the Court contained in said instructions in which the Court finds that on the 1st day of February, 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said lands and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same and ousted and ejected the plaintiff from the same, excepting the portions described as "A" and "B" in the said instructions and in the answer of defendants, and ever since wrongfully withheld and still withholds the possession thereof from plaintiff.

The defendants further specify the following particulars in which the evidence is insufficient to justify the verdict of the jury, and on which they will rely on their said motion for a new trial and appeal, to-wit:

1st. The evidence is insufficient to show that the plaintiff ever was the owner of the land in controversy or any part thereof, or that he ever had any title thereto.

2nd. The evidence is insufficient to show that the plaintiff ever was in the possession of any part of the land described in the complaint except the two portions thereof described in defendants' answer and designated therein as "A" and "B."

3rd. The evidence is insufficient to show that the plaintiff was damaged by the withholding of the land described in the complaint, in the sum of $2000.00 or any other sum greater than $580.00.

4th. The evidence showed that the rental value of the land in controversy did not exceed $180.00 per year, and that for the whole period alleged in the complaint during which the defendants have withheld the same, the rental value of said land was $1080.00, and that during the period during which defendants have been in possession of said land before
191 the commencement of this action, the said defendants erected on said land permanent improvements consisting of a house and fencing of the value of $500.00, and that said defendants were at the time of the erection holding said lands under color of title adversely to the claim of the plaintiff in good faith, and the verdict of the jury for the sum of two thousand dollars damages was contrary to this evidence and unsupported by any evidence of damage in a greater sum than $580.

SPECIFICATIONS AS TO EXCEPTIONS.

The defendants hereby specify the following particular exceptions upon which they will rely on their motion for a new trial herein and on their appeal from the judgment therein, to-wit:

1st. Upon their exception to that portion of the instructions of the Court in which the Court instructed the jury that on the 1st day of February, 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto, the owner of and in the possession of and entitled to the possession of and from thence hitherto has been the owner of and entitled to the possession of the land described in the plaintiff's complaint and also described in said instructions.

2nd. Upon their exception to that portion of the instructions of the Court in which the Court instructed the jury that on the 1st day of February, 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same and ousted and ejected the plaintiff from the same, excepting the portions described as "A" and "B" in the said instructions and in the answer and ever since wrongfully withheld and still withholds the possession thereof from the plaintiff.

3rd. Upon their exception to that portion of the instructions of the Court in which the Court instructed the jury that, the above being the conclusions of the Court on the
192 issues submitted to it for determination, the Court hereby instructs the jury that their verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of all the land in controversy, i. e., all of the 46.26-100 acre tract described in the complaint save and except the two parcels thereof which are now in plaintiff's possession.

HEPBURN WILKINS,
Attorney for Defendants.

And because the matters aforesaid do not appear by the record of said cause, the Hon. F. M. Angellotti, the Judge of said Court before whom said cause was tried, hath hereto set his hand at the request of the defendants herein this 15th day of July, 1897, in testimony that the foregoing Bill of Exceptions is a true Bill of Exceptions on the defendants' motion

for a new trial and an appeal from the judgment herein and the said Bill of Exceptions is hereby settled and allowed.

F. M. ANGELLOTTI,
Judge.

Filed July 15, 1897.

THOS. S. BONNEAU,
Clerk.

[Title of Court and Cause.]

ORDER DENYING MOTION FOR A NEW TRIAL AND GRANTING A NEW TRIAL AS TO DAMAGES UNLESS $400.00 BE REMITTED.

In Open Court, July 26th, 1897.

The action of the defendants to set aside and vacate the decision of the Court, the verdict of the jury and the judgment hereintofore entered herein, and to grant a new trial of said action, came on regularly for hearing on the 26th day of July, 1897, and after hearing H. Wilkins, Esq., defendants' attorney, in favor of said motion, and Messrs. E. B. Mahon and L. D. McKisick in opposition thereto,

193 It is Ordered that said motion be, and the same is, hereby denied as to the decision, verdict and judgment herein, except as to the amount of damages awarded to plaintiff in the verdict and judgment herein, and that if within twenty days from the entry of this Order, the plaintiff does not file herein a written consent that the judgment as to damages in favor of plaintiff be for the sum of sixteen hundred dollars and costs instead of two thousand dollars and costs, then that a new trial be granted, but only as to the issue as to the amount of damages to which plaintiff is entitled for the withholding of the possession of the land in controversy.

And if within twenty days such consent on behalf of plaintiff is filed, then that the motion for a new trial be denied as to all and singular of the issues in this cause, and that said decision, verdict and judgment stand in all respects as made, filed and entered herein, except that the judgment as to damages shall be in favor of plaintiff for sixteen hundred dollars and costs in lieu of two thousand dollars and costs, and that execution of the judgment herein be stayed for twenty days from this date.

Plaintiff on the 31st day of July, 1897, consented to the modification of the judgment as provided by the last foregoing

order and on the same day the Court made and entered an order modifying said judgment accordingly.

[Title of Court and Cause.]

ORDER DENYING MOTION FOR A NEW TRIAL.

July 31st, A. D. 1897.

Present, Hon. F. M. Angellotti, Judge.

The plaintiff, in compliance with the order heretofore, to-wit, on the 26th day of July, 1897, made and entered herein, having filed his written consent that the judgment in favor of plaintiff, as to the damages for withholding the premises in controversy, be for the sum of Sixteen Hundred Dollars and costs, instead of Two Thousand Dollars and costs.

194 It is ordered that the defendants' motion for a new trial of this action be, and the same is, hereby denied, as to all and singular the issues in this cause.

[Title of Court and Cause.]

NOTICE OF APPEAL.

To E. B. Mahon, Esq.,
L. D. McKisick, Esq., and the
Clerk of the above entitled Court.

You will please take notice that the defendants in the above entitled action hereby appeal to the Supreme Court of the State of California, from the judgment in said action, dated the 21st day of April, 1897, and entered April 22nd, 1897, in favor of the plaintiff and against the defendants in said action, and from the whole and every part of said judgment, also from the order made and entered in said action on the 26th day of July, 1897, denying the defendants' motion for a new trial and from the whole of said order except that portion thereof granting a new trial as to the issues as to the amount of damages unless the plaintiff file a consent that the judgment be reduced to $1600.00, also from the order made and entered in said action on the 31st day of July, 1897, denying the defendants' motion for a new trial and from the whole of said order.

Dated August 13th, 1897.

HEPBURN WILKINS,
Attorney for Defendants.

CERTIFICATE.

We hereby certify that the foregoing are true and correct copies of papers on file in the above entitled action and the proceedings of record in said action, and that the same constitutes the Transcript on Appeal of the Defendants therein from the judgment and the order denying the defend-
195 ants' motion for a new trial therein.

And we further certify that an undertaking on said appeal in due form has been properly filed in said action.

Note the changes made in said transcript opposite the initials E. B. M. made before signing.

HEPBURN WILKINS,
Attorney for Defendants and Appellants.
E. B. MAHON and L. D. McKISICK,
Attorneys for Plaintiff and Respondent.

Dated Sept. 21st, 1897.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Ebenezer Wormouth,
Plaintiff,

vs.

Peter Gardner and Jacob Gardner,
Defendants.

DEFENDANTS' TRANSCRIPT ON APPEAL.

Filed September , 1897.

T. H. WARD,
Clerk.

By
Deputy Clerk.

OPINION AND JUDGMENT.

Filed July 6, 1899.

SUPREME COURT OF THE STATE OF CALIFORNIA, DEPARTMENT TWO.

Ebenezer Wormouth,
Plaintiff and Respondent,
v.
Peter Gardner and Jacob Gardner,
Defendants and Appellants.

S. F. No. 1143.

This is an action in ejectment to recover possession of certain lands described in the complaint. Judgment be-
196 low went for plaintiff, and defendants appeal from the judgment and from the order denying a motion for a new trial.

Plaintiff claims title under a homestead entry made in accordance with the United States laws upon that subject (see Wormouth v. Gardner, 105 Cal. 149), and before the filing of the cross-complaint hereinafter mentioned he received a United States patent for the lands in pursuance of his homestead entry. The principal contention of defendants for a reversal is in relation to what they call their equitable title. This title, as shown in the cross-complaint, is briefly as follows: It is averred that the land in contest here was within the exterior boundaries of a certain Mexican grant, made in 1835, to Juan Reed, of a certain tract of land called the Rancho Corte de Madera del Presidio—usually called the Reed Rancho; that this grant was presented to the Land Commissioners and the United States District Court, and was confirmed; that a United States patent to the rancho was issued to the heirs of Reed in February, 1885, and that the patent excluded the land in contest in this case, and that the Reed heirs supposed the land was included within said grant, and with that understanding conveyed the same to various parties, through whom, by mesne conveyances, whatever right they had to this piece of land became vested in the defendant Jacob Gardner, whose immediate grantor was one Throckmorton. It is further averred, that in January, 1875, the said Throckmorton made application to the United States Land Department to purchase said land, under the Act of Congress, entitled "An Act to quiet titles in California," approved July 23,

1866, basing his application upon the facts hereinbefore stated, and that the plaintiff herein, Wormouth, was made a party defendant in said application, and that a contest took place in the Land Department between Throckmorton, upon his claim as aforesaid, and Wormouth as a homestead claimant; that the Register and Receiver of the United States Land Office at San Francisco, in which application was made, decided the case in favor of Wormouth, and against Throckmorton; that
197 Throckmorton appealed to the Commissioner of the General Land Office, who also decided the case against him; and that he then appealed to the Secretary of the Interior, who again decided the case against him and in favor of Wormouth; but that each of said officers decided the case upon an erroneous proposition of law; and that therefore it ought to be decreed that the plaintiff holds said land in trust for defendant Jacob Gardner, and should convey the same to the latter. A demurrer to this cross-complaint was sustained by the court below, but upon appeal this Court held that the averments of the complaint were sufficient on their face to show that the decision of the land department had been based upon an erroneous construction of the law, and reversed the case, with directions to the Court below to overrule the demurrer—the Court declaring, however, in its opinion, very clearly, the principles upon which it should be determined whether or not the decision of the Land Department was final. See Wormouth v. Gardner, 112 Cal. 506. After the remittitur went down, the plaintiff filed an answer in which all the material averments of the cross-complaint were denied. Upon the trial the defendants introduced all the proceedings had in the Land Department in the said contest of Throckmorton and Wormouth. That contest was one entirely within the jurisdiction of the United States Land Department, that is, each party was endeavoring to get title to what each admitted to be United States government land, which was subject to disposition under the laws of the United States. The Land Department, therefore, had exclusive jurisdiction to determine all facts which arose in the contest; and in order to successfully attack the decision of the department the defendant in this present case would have to show that such decision was founded upon an erroneous notion of the law. But this he has failed to do. The department, among other things, found that the land in contest never was within the boundaries of the grant to Reed; that it was never regarded as being included in that grant, and that Throckmorton, at the time he claimed to

have purchased from the Reed heirs, either knew or had
198 good reason to believe that the land was not included in the grant, and was not a bona fide purchaser within the meaning of the Act of July 23, 1866. In Wormouth v. Gardner, 112 Cal. 506, this Court said: "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the actual possession of the same, according to the lines of his purchase, were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as his belief that the land he purchased was included within the original limits of the Mexican grant were also facts to be determined by that officer from all the circumstances under which the purchase was made. Whether that officer properly considered the weight to which the evidence before him was entitled, or whether he drew correct conclusions from that evidence, his determination with reference to these facts, whether correct or erroneous, is conclusive upon the judicial tribunals. These tribunals cannot exercise a revisory jurisdiction over him in matters which are within the scope of the authority conferred upon him, but if, upon the undisputed facts, he made an erroneous application of the law pertinent to these facts, his action is open to review." In the case at bar it nowhere appears that the Secretary of the Interior made an erroneous "application of the law," but it does appear that his decision was based upon facts which necessarily defeated the claim of Throckmorton. For the same reasons the decision of the United States land department was conclusive as to Wormouth's title as a homestead claimant.

What appellant claims as his legal title was presented to the jury in the shape of an issue as to damages for detention of the land. The jury found a verdict of two thousand dollars, which the court reduced to sixteen hundred dollars. The United States patent to the Reed heirs was finally determinative of the boundaries of the grant; and we see no other point in the case necessary to be discussed.

The judgment and order appealed from are af-
199 firmed.

McFARLAND, J.

We concur:
TEMPLE, J.,
GAROUTTE, J.

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR, WITH SUPERSEDEAS.

To the Honorable William H. Beatty, Chief Justice of the Supreme Court of the State of California:

Come now Jacob Gardner and Peter Gardner, the defendants and appellants in said Supreme Court of the State of California, and as plaintiffs in error herein, and petition that you, the Honorable Chief Justice of said Supreme Court, allow a writ of error, directed to the Supreme Court of the State of California, to be taken to the Supreme Court of the United States, from the final decision and judgment of said Supreme Court of the State of California, rendered in the above-entitled cause, wherein Ebenezer Wormouth was the respondent and the said Jacob Gardner and Peter Gardner were the appellants, the same being numbered in the records of said Supreme Court of said State of California as "San Francisco No. 1143," upon the ground that in said decision and final judgment of said Supreme Court of the State of California there is drawn in question certain title and right of the said Jacob Gardner and Peter Gardner claimed under the Constitution of the United States, and claimed under the Treaty of Guadalupe Hidalgo, a treaty of the United States with the Republic of Mexico, and under the laws of the United States, the same being specified and particularized in an assignment of errors in that behalf, to be filed in said Supreme Court of the State of California, and in the Supreme Court of the United States, upon said writ of error, a copy of which assignment of errors is hereunto attached, referred to and made part hereof, and to be filed herewith, and because the said decision and said final judgment of said Supreme Court of the State of California was against the said title and right of the said Jacob Gardner and Peter Gardner, claimed under said Constitution and under said treaty, and under the said laws of the United States, in order that said decision and said final judgment of said Supreme Court of the State of California may be re-examined and reversed in said Supreme Court of the United States, agreeable to the provisions of section 709 of the Revised Statutes of the United States.

And, further, that an order be made fixing the amount of security which the said Jacob Gardner and Peter Gardner,

said appellants, as said plaintiffs in error, shall give and furnish upon said writ of error, and that upon the giving of such security that all proceedings in said Supreme Court of the State of California, in the Superior Court of said State of California, in and for the County of Marin, be suspended and stayed until after the final determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray.

GEORGE W. MONTEITH.

Attorney for Jacob Gardner and Peter Gardner, said Appellants and said Plaintiffs in Error.

[Endorsed:] Filed Aug. 8, 1899.

GEO. W. ROOT, Clerk.
By A. W. Johnson, Deputy.

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR WITH SUPERSEDEAS.

Upon the annexed petition of Jacob Gardner and Peter Gardner, the appellants therein mentioned, and as plaintiffs in error as therein mentioned, through George W. Monteith, Esq., their attorney, and upon the filing of the petition for a writ of error and assignment of errors, it is hereby ordered that a writ of error be and is hereby allowed to have reexamined and reviewed in the Supreme Court of the United States, the decision and final judgment heretofore entered in the Supreme Court of the State of California in said cause herein, the said Jacob Gardner and Peter Gardner are the appellants and the said Ebenezer Wormouth is the respondent, the said cause being numbered in the records of the Supreme Court of the State of California, "San Francisco, No. 1143."

And it is further ordered that the amount of the bond upon said writ of error, and for the purpose of having suspended and stayed all further proceedings in said Supreme Court of the State of California and in the Superior Court of the State of California, in and for the County of Marin, upon or in pursuance of said decision and the said final judgment of the Supreme Court of the State of California, until the determination of said writ of error by the Supreme Court of the United States, is hereby fixed at twenty-five hundred ($2500) dollars.

And it is ordered that upon the giving by the said Jacob Gardner and Peter Gardner, said appellants as said plaintiffs

in error, of said bond in said sum of twenty-five hundred ($2500) dollars, and when approved by the Chief Justice
200 of the Supreme Court of the State of California, the Justice allowing the issuance of said writ of error, that all further proceedings in said Supreme Court of the State of California and in said Superior Court, be stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated August 8, 1899.

[Signed.] W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

And now, to-wit: on this the seventh day of August, A. D. 1899, Jacob Gardner and Peter Gardner, the above-named plaintiffs in error, come by George W. Monteith, Esq., their attorney, and say: That in the record and proceedings of the above-entitled matter, there is manifest error in this, to-wit:

I.

The said Supreme Court of the State of California erred in affirming the judgment of the Superior Court of said State, in and for the County of Marin therein, in the following particulars, to-wit:

(a) In holding and deciding that the finding of said Superior Court upon the evidence before it, to-wit:

"1st. That on the first day of February, A. D. 1891, plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto, had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit": (particularly describing the land that was the subject matter of the cause of action then pending between the parties hereto in said Superior Court);
201 was sustained by the evidence in the case.

(b) In not holding and deciding that the said plaintiff therein, Ebenezer Wormouth, was not the owner of the land in controversy, or any part thereof, in that the evidence in said case did show without any material or substantial con-

flict whatever that the defendant therein, Jacob Gardner, was, on the first day of February, A. D. 1891, the owner of said premises then in the possession thereof, and then entitled to the possession thereof, and from thence hitherto had been the owner, and entitled to the possession thereof, and that his ownership and title to said premises was, by reason of his being through mesne conveyances there in evidence, the successor in interest of John J. Reed, Hilarita M. Reed, and Inez Reed Deffebach, who, at the time of the acquisition of California from the Mexican government, were the Mexican owners of the premises and under the Treaty of Guadalupe Hidalgo entitled to remain in possession thereof at that time (their right thereto having been confirmed by the United States District Court for the Northern District of California, in a proper proceeding concerning the same, under the Act of Congress of March 23, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California."

(c) In holding and deciding that the finding of said Superior Court, to-wit:

"That on said first day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without any right and title, wrongfully and unlawfully entered into and upon the same and ousted and ejected plaintiff from the same" excepting certain specific portions), was sustained by the evidence in said case.

(d) In not holding and deciding that upon the first day of February, A. D. 1891, the said defendant, Jacob Gardner, was lawfully in the possession of said land and premises under a title, right and possession acquired by him through mesne conveyances from Juan Reed, who, in 1835, had obtained a valid title to said premises from the Mexican government,
202 and whose heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, at the time the Treaty of Guadalupe Hidalgo was made, were in possession of and who were entitled thereto under said treaty, and who from the time of said treaty, by themselves and by their successors, including said Jacob Gardner, had been in lawful, continuous, actual and adverse possession of said premises from the month of November, 1835, down to and including said first day of February, A. D. 1891.

(e) In not holding and deciding that the evidence before said Superior Court, as contained in the record upon the appeal therefrom to said Supreme Court of said State of Cali-

fornia, did show, without any material or substantial conflict, that Jacob Gardner was the owner of said premises, in the possession thereof, and entitled to a possession thereof, under a valid and vested right and title thereto, under the constitution and laws of the United States, and under the Treaty of Guadalupe Hidalgo, and as the lawful successor in interest of the said John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, to whom the same had been decreed by the United States District Court in and for the Northern District of California.

II.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that under the Constitution and laws of the United States the right and title claimed by the said plaintiff Wormouth to the premises was invalid, and was based upon and under a pretended homestead entry that had been made by the said Wormouth in the United States Land Office at San Francisco, California, and that was predicated upon a forcible entry of the said Wormouth into a portion of the premises in controversy, at a time when the predecessors in interest of the said Jacob Gardner were in lawful, actual, exclusive and adverse possession thereof, and at
202 a time when the United States was not in possession of any portion thereof.

III.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the title claimed by said plaintiff Wormouth was one based wholly upon and under the laws of the United States, with reference to the disposition and sale of the public lands of the United States by the United States Land Department, and was one wherein the officers of said Land Department had assumed to convey to the said Wormouth the premises in controversy, which the evidence in the record before said Supreme Court did show, without any material or substantial conflict, never was a part of, and never had been a part of or included within the public lands of the United States, and to which the United States

never had any lawful right, title or interest in, or claim to, and which the officers of the United States in the Land Office at San Francisco, California, and in the Land Department of the United States, never had or had had any jurisdiction of or control over, under the laws and Constitution of the United States, but which for many years prior to, and at the time of the acquisition of California by the United States, under said treaty, were and ever since have been private lands, and held and owned by the predecessors in interest of said Jacob Gardner, whose title thereto accrued long before the making of said Treaty of Guadalupe Hidalgo, between the United States and the Republic of Mexico, and which right and title was recognized by and vested in them by said treaty, and by them, through mesne conveyances, transmitted to said Jacob Gardner.

IV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in
204 not reversing the same, upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that the rights claimed by both parties to the premises in controversy were dependent wholly upon, and were under the Constitution, treaties and laws of the United States, and that under the Constitution, treaties and laws of the United States, the title, ownership and right of possession claimed by the said Wormouth were invalid and wholly void.

V.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that as it appeared in the evidence contained in the record before said Supreme Court, without any material or substantial conflict, that the entire claim of the said plaintiff, Wormouth, to the premises was as a homestead claim under the laws of the United States; at the time the proceeding was instituted he had not acquired any title from the United States to the premises.

VI.

That the Supreme Court of the State of California erred in

affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the original homestead entry under which the said plaintiff, Wormouth, claimed title to the premises in controversy was void, in that it appeared that at the time said entry was made S. R. Throckmorton, the predecessor in interest of the said Jacob Gardner, was in actual, exclusive and adverse possession of the premises, claiming under a right and title vested in him by virtue of said treaty, against that of the United States, and by reason of which, under the laws, treaties and Constitution of the United States said homestead entry, and all subsequent proceedings in the Land Department based thereon, were
205 absolutely void.

VII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that all questions of title to, possession, or ownership of the premises in controversy, of both parties, were upon and under the Constitution, treaties and laws of the United States, under which it appeared in the record before said Supreme Court, without any material or substantial conflict, that the title claimed by the said plaintiff, Wormouth, was wholly void, and that the title claimed by the said defendant, Jacob Gardner, was thereunder valid and well vested.

VIII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of said Superior Court, to-wit:

"1st. That on the first day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises" (describing the premises described in the complaint in said action in said Superior Court), was under the Constitution, treaties and laws of the United States wholly contrary to and unsustained by the evidence in said case appearing in the record on appeal before said Supreme Court.

IX.

That the Supreme Court of the State of California erred in

affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of
206 the Superior Court, to-wit:

"2nd. That on said first day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possesson of said lands and premises the defendants, without right or title, wrongfully and unlawfully entered into and upon the same," and ousted and ejected plaintiff from the same (excepting a certain portion thereof therein described), was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence.

X.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the instruction of said Superior Court to the jury upon the trial in said Superior Court, whereby said jury was instructed that its verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence in that the evidence without any material or substantial conflict showed an absolute right and title thereto in said Jacob Gardner, under said treaty and the Constitution and laws of the United States.

XI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the finding of said Superior Court, and the verdict of the jury therein, upon which said judgment was based, were under the Constitution, treaties and laws of the United States wholly unsupported and unsustained by the evidence, and were contrary to the same adduced upon the trial in said Superior Court, it appearing in the record on appeal before said Supreme Court, without any material or substantial conflict, that said Jacob Gard-
207 ner held abosolute right and title thereto, under the provisons of said treaty and the laws of the United States relating thereto.

XII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the evidence before said Superior Court appearing in the record on appeal before said Supreme Court, did show, without any material or substantial conflict, that the lands in controversy lay east of the western boundary of the Rancho Corte Madera del Presidio, and were included therein, accordingly as the same were possessed by Juan Reed from November, 1835, and by him down to the time of his death, by his heirs after his death, and by their successors in interest, down to and including the said defendant therein, Jacob Gardner, secured by said treaty and the Constitution and laws of the United States.

XIII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence before said Superior Court, without any material or substantial conflict, that the premises in controversy were included within the boundaries of the Rancho Corte Madera del Presidio, accordingly as the same were secured by said treaty and confirmed to the heirs of Juan Reed by the final decree of the United States District Court of the Northern District of California, of January 14, 1856, and because that the title and interest of the said heirs of the said Reed to the premises in controversy had become vested in said defendant, Jacob Gardner, through mesne conveyances from their successors in interest.

XIV.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not re-
208 versing the same, upon the ground that it appeared in the evidence before said Superior Court that under the laws of the United States, under which the said plaintiff, Ebenezer Wormouth, claimed title to said premises, he had acquired no title to ownership in or right of possession to the premises in controversy, or any part thereof, and that he was not entitled to maintain the action in said Superior Court, as against the defendant, Jacob Gardner, or any other person, in

that his original homestead entry and all proceedings based thereon, were void, under the laws and Constitution of the United States.

XV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, and in not ordering the same dismissed or abated upon the ground that in the record on appeal from said Superior Court before said Supreme Court, it was shown conclusively said Superior Court was without jurisdiction to adjudicate any of the issues involved in said cause of action in that the jurisdiction to determine said controversy lay wholly within the Courts of the United States, under the said Act of Congress of March 3, 1851.

XVI.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the whole controversy in said Superior Court turned upon the location of the boundaries of the Rancho Corte Madera del Presidio, which, under the Constitution and laws of the United States, and being based upon a right under a treaty of the United States, and under its Constitution and laws, could only be determined by the Courts of the United States, which had exclusive jurisdiction to determine the same.

209

XVII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that said Superior Court was without jurisdiction to determine the subject matter of the controversy involved in said cause of action before it, the same being vested exclusively in the United States District Court for the Northern District of California, by said act of March 3, 1851.

XVIII.

The said Supreme Court of the State of California erred in

affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the controversy before the Superior Court involved the right, title, ownership and possession of the premises there in controversy, which right, title, ownership and possession being dependent wholly upon a treaty of the United States, to-wit: the Treaty of Guadalupe Hidalgo, was by the Constitution and laws of the United States, and particularly by the Act of Congress of March 3, 1851, hereinbefore referred to, exclusively cognizable and determinable in the District Court of the United States of the Northern District of California, and the Supreme Court of the United States, and in that the question of the right, title, ownership and possession there involved had been finally adjudicated and settled in said District Court by a final decree of said District Court, confirming the right and title of the heirs of Juan Reed to the land in controversy (together with other lands), and the right and title thereto being a right and title under said treaty, was drawn in issue in Superior Court, which Superior Court found erroneously adversely thereto, and basing its judgment upon such finding, erroneously rendered judgment against the said defendant, Jacob Gardner, and which judgment was affirmed by said Supreme Court, notwithstanding that said right and said title under said
210 treaty was there fully presented and argued, and the decision of said Supreme Court of the State of California was thereby against said right and said title, under said treaty claimed by the said defendant, Jacob Gardner, as the successor in interest of the said heirs of Juan Reed, the confirmees under said decree of said District Court, and thereby denied the said defendant, Jacob Gardner's, right and title under said treaty to said premises.

XIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed title to the premises in controversy, under the treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who became then possessed thereof and was possessed thereof from that time until his

death in 1843, at which time his title and possession of said premises descended and became vested in and were possessed by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who as his heirs, and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California in a decree which became final and filed in said District Court January 14, 1856; the title of said heirs of said Juan Reed thereto, through mesne conveyances upon the 17th day of July, 1890, having
211 been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid title claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said title claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and because the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same; and because, by reason of said decision of said Supreme Court of the State of California affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his title to said premises duly claimed by him and duly vested in him by reason of

said Treaty of Guadalupe Hidalgo and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in
212 not reversing the same, upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed right and title to the premises in controversy, under the Treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who then became possessed thereof, and was possessed thereof from that time until his death in 1843, at which time his right and possession of said premises descended and became vested in and were possessed by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who, as his heirs and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California, and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid, were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California, in a decree which became final, and filed in said District Court, January 14, 1856; the right of said heirs of said Juan Reed thereto, through mesne conveyances, upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob

Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained
213 by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid right claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said right claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and before the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same. And because, by reason of said decision of said Supreme Court of the State of California, affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his right to said premises duly claimed by him and duly vested in him, by reason of said Treaty of Guadalupe Hidalgo, and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said title of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said right of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the
214 United States, to the premises in controversy.

XXIII.

That said Supreme Court of the State of California erred in

not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was beyond its jurisdiction in that it in effect reviewed and set aside the said decree of said United States District Court of January 14, 1856, so far as the same confirmed the right and title of said Jacob Gardner and his predecessors to said premises.

XXIV.

That said Supreme Court of the State of California erred in not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was against the right and title of said Jacob Gardner to said premises as secured to his predecessors by said Treaty of Guadalupe Hidalgo.

XXV.

That said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, and in not reversing the same, upon the ground that the title, ownership and possession of the premises there in controversy, and the question of title thereto, had been finally adjudicated in the District Court of the United States for the Northern District of California, in its aforesaid decree of January 14, 1856, and upon the further ground of said Superior Court was without power, authority or jurisdiction to change, alter or review the lawful effect of said decree, and was without jurisdiction to settle any right of the parties thereto, or their successors in interest, including said defendant, Jacob Gardner, finally determined or settled or adjudicated thereby.

XXVI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in
215 not reversing the same, on the ground that the title and the right was one insured and guaranteed to the said heirs of said Juan Reed, and to their successors in interest, including said defendant, Jacob Gardner, under said Act of Congress of March 3, 1851, to the premises in controversy.

XXVII.

That said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, upon the ground that the said Superior Court, by its said judgment, had in excess of its authority and jurisdiction decided against and held invalid the right and title of the Reed heirs to the premises in controversy, under the Treaty of Guadalupe Hidalgo, and which was confirmed to them and finally adjudicated valid by the United States District Court, by its said final decree of January 14, 1856, and to which right and title said Jacob Gardner had succeeded, as shown by certain mesne conveyances from said Reed heirs and their successors in interest, mentioned in the pleadings, and proved by the evidence at said trial, without any conflict whatever.

XXVIII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the sole question of right and title to the premises in controversy, before said Superior Court, was upon the validity of the right and title to said premises claimed by said Jacob Gardner, whose claim was that, as the successor in interest of said Reed heirs, the Mexicans who owned and possessed said premises at the time said treaty was executed and went into effect, his right and title to said premises which was secured to said Reed heirs by said treaty, and of the Constitution and laws of the United States relating thereto, and which had been confirmed to them by said United States District Court of the North-
216 ern District of California by its said decree of January 14, 1856, and that his ownership of said premises was the same ownership as their ownership and as their lawful successor in interest thereto, and that their possession beginning with that of their ancestor, Juan Reed, in November, 1835, had continued uninterruptedly through them and their several successors in interest down to and including the said Jacob Gardner, at the time of the commencement of said action, and ever since, and that his said right and title to said premises was the only issue before said Superior Court, upon which it based the following findings, to-wit:

1st. That on the 1st day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was and for a long time prior thereto

had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning, being lot 3 of Section 28, and lot 3 of Section 29, township 1 north, of Range No. 6 west, M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining." And that the judgment of said Superior Court, being based upon that finding and decision against said title and right claimed under said treaty by the said Gardner, was contrary to the provisions of the Constitution, treaties and laws of the United States relating thereto, and operated to destroy, set aside and annul a valid and vested right and title
217 belonging to the said Gardner under the provisions of said treaty, and the Constitution and laws of the United States.

XXIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that there was no evidence before said Superior Court upon which there was raised any material or substantial issue of fact upon any point or question involved in said claim of right and title of said Jacob Gardner, under said treaty, and there was nothing to sustain said finding set out in the preceding assignment of error number XXVIII, and that said finding of said Superior Court was found by said Superior Court solely because it appeared that the said Land Department had issued a patent to said Reed heirs after they had parted with their title and possession to the premises in controversy to certain of their successors in estate, who were the predecessors in estate of the said Jacob

Gardner, and which patent fixed the boundaries of said Rancho Corte Madera del Presidio upon different lines from those established by said decree of said United States District Court, of January 14, 1856, in this, to-wit: the said decree of said United States District Court adjudged said boundaries to be the same as laid down in the original grant of said rancho to said Juan Reed in 1835, and which grant of possession fixed the western boundary of said rancho upon a line that ran west of the premises in controversy, and which began as therein specified at the "solar" or house lot of the said Juan Reed, and thence ran north to the waters of the Arroyo Holon, and that the northern boundary of said rancho, beginning where said western boundary ended at a forest of redwoods in said Arroyo Holon, continued eastwardly along the waters of said Arroyo Holon, and that said western and northern boundaries as laid down and fixed in said grant of possession to said Juan Reed which was confirmed by and which became a part
218 of said decree of said District Court, included the premises in controversy within the boundaries of said rancho, and the said ranch according to said boundaries, and after his death, as aforesaid, his said heirs went into possession thereof, and continued in actual possession thereof until they conveyed the same to the predecessors of said Jacob Gardner, as alleged in the cross-complaint of Jacob Gardner in said Superior Court.

That according to said grant of possession to said Juan Reed, confirmed by said District Court, as aforesaid, the said western boundary beginning at said "solar" as aforesaid, went thence west of north accordingly as exemplified therein, and particularly in the map attached to said grant of possession.

That said patent issued by said Land Department to said Reed heirs was issued upon the 25th day of February, 1885, and the boundaries of said grant, according to said patent, did not commence at said "solar" or house lot, but, on the contrary, commenced at another point about three-quarters of a mile therefrom, and which point was pretended to be said "solar," and they ran said boundary from said pretended "solar" thence south to the Arroyo Corte Madera del Presidio, upon an entirely different line from that fixed and specified by said decree of said District Court, to-wit: said boundaries as laid down in said grant of possession to said Juan Reed; that the western boundary of said rancho, according to said patent, ended at said pretended "solar," and ran east of the premises in controversy, and wholly excluded from the north-

ern boundary of said rancho the waters of said Arroyo Holon; that said western boundary, according to said patent, beginning at its southernmost point, ran east of north, as against that of said grant of possession, which ran west of north; that said map was based upon a map compiled in said Land Office, and which map was not made lawfully upon a survey under the laws of the United States; that in the evidence in said Superior Court, it was proved, without any material or substantial conflict, that said "solar" was located where said defendant, Jacob Gardner, claimed the same was located, and where the decree of said District Court located it, and
219 said evidence also proved, without any conflict whatever, that the western boundary of said rancho lay west of the premises in controversy and not east of them; that there was no evidence in said record to in any wise sustain, or that even tended to show that the western boundary line contained in said patent conformed in any respect to said decree of said District Court, but on the contrary said evidence, without any material and susbstantial conflict whatever, showed that said western boundary lay west of said premises, and not east thereof, and that the line as delineated and laid down in said patent in no wise followed the decree of said District Court, but on the contrary said patent specified that the boundaries of said grant commencing at the "solar" went south to the Arroyo Corte Madera del Presidio, wholly contrary to said decree, and in violation of its express mandate, but was made solely by said Land Department, and was made without authority of law.

That the whole basis upon which said finding of said Superior Court was based was the mere fact that said Land Department, in compiling its map and survey, and in issuing its patent, had thereby excluded the premises in controversy from said rancho, contrary to said decree of said United States District Court, and notwithstanding that no court of competent jurisdiction had ever decreed otherwise than said District Court, and that the said Jacob Gardner and his predecessors in estate had held actual, continuous and adverse and lawful possession of said premises from the time the same was originally granted to said Juan Reed in November, 1835, as aforesaid, down to the time of the commencement of said action in said Superior Court, and ever since, and notwithstanding that the right and title of the said Jacob Gardner to said premises was a right claimed and held under said Treaty of Guadalupe

Hidalgo, under said decree of said District Court, and under the Constitution and laws of the United States, and which had been finally settled and adjudicated.

XXX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in
220 not reversing the same, upon the ground that the action was prematurely commenced in said Superior Court by said Wormouth, as plaintiff, and in that at the time of the commencement of the same, the said Wormouth's application therefor was pending in the Land Department, the patent had not been issued, and if the United States had title to the premises it had not parted with the same, and said Wormouth, claiming none other than the United States title, had none whatever, and could not therefore maintain said action; as under the laws of the United States the title does not pass or vest in a homestead claimant until the United States patent conveying the title of the Government issues, except in the case of mere naked trespassers who neither have nor make bona fide claim of title.

XXXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the sole question of title decided by said Superior Court was one wherein the original primary sovereign title of the United States was at issue, i. e., the question as to whether the lands in controversy were ever included with the public land of the United States or not; whether they were under the Treaty of Guadalupe Hidalgo public lands of the United States, or the lands of private owners who possessed them at the time of, and prior to the execution of said Treaty under the laws of the Republic of Mexico; and that the settlement of that question was one which, under the Constitution and laws of the United States, particularly under the Act of Congress of March 3, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California," was vested solely in the Courts of the United States, to-wit: The District Court of the Northern District of California, and on appeal therefrom, the Supreme Court of the United States, and because said Superior Court
221 was without jurisdiction to make any determination with reference to the settlement of that question.

XXXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same upon the ground that the question of right and title decided by said Superior Court was one which had been finally settled and determined by said decree of said United States District Court, and which said Superior Court was without power, authority or jurisdiction to in any wise determine.

XXXIII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the following grounds, to-wit:

(a) That the evidence was insufficient to justify the second finding of the Superior Court upon the equitable issues in the case to the effect that one of the questions decided by the United States Commissioner of the General Land Office and by the United States Secretary of the Interior, in the contest of Throckmorton v. Wormouth, mentioned in the 20th paragraph of the cross-complaint in said cause, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed and that there was no evidence to support said finding.

(b) That the evidence was insufficient to justify the third finding of the Superior Court, upon the equitable issues before it, that the officers of the United States Land Department, to-wit: The Register and Receiver, Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact, upon the evidence produced before said Register and Receiver on said contest, was not included in said original grant by the Mexican Government to Juan Reed, and
222 that there was no evidence to support said finding.

(c) That the evidence was insufficient to justify that portion of the fifth finding of the Superior Court, upon the equitable issues before it, in which it is found that the consideration paid by J. Clinton Bolton to the Reed heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, for the United States Register and Receiver, and affirmed by the deed to him in 1865, was not a money consideration and that

the only consideration which passed from said Bolton to said grantors was the agreement by said Bolton mentioned in said fifth finding, and there is no evidence to support said finding;

(d) The evidence was insufficient to justify the sixth finding of the Superior Court, upon the equitable issues before it, to the effect that the officers of the United States Land Department, to-wit: The United States Register and Receiver, the Commissoner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of Throckmorton v. Wormouth, in denying said application of Throckmorton, did not base their decision upon the question of law alone, but did find and decide, as a fact, that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, but on the contrary the evidence showed that said officers of the United States Land Department based their decision in said contest upon the question of law alone, and did not find and decide that the said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, and that there was no evidence to support said finding.

(e) The evidence was insufficient to justify and there was no other evidence to support that portion of seventh finding of the Superior Court, upon the equitable issues before it, wherein it is found that the rancho granted by the Government of California under the Government of Mexico to Juan Reed, did not include within its exterior limits the lands described in the deed from T. B. Deffebach et al. to Julius C. McCeney, of February 14, 1871, or any part thereof except so much as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J.
223 Reed et al., and the evidence is insufficient to justify, and there is no evidence to support that portion of said seventh finding, wherein it is found that the grant mentioned in the first paragraph of said cross-complaint did not include any part of the land in controversy in this action, and that no grant was ever made by the Mexican Government to Juan Reed or his successors in interest included in any part of the land described and granted to the plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

(f) The evidence was insufficient to justify and there was no evidence to support the eighth finding of the Superior Court, upon the equitable issues before it, to the effect that the land described in said deed from T. B. Deffebach et al. to

Julius C. McCeney, or any part thereof, except as in the seventh finding of the Court set forth, was not within the exterior boundaries of said Mexican grant.

(g) That the evidence was insufficient to justify and there was no evidence to support that portion of the ninth finding of the Superior Court to the effect that the consideration mentioned in the ninth finding of the Superior Court upon the equitable issues before it, to the effect that the consideration mentioned in the fifth finding upon said equitable issues, was the only consideration for the deed mentioned in said ninth finding.

(h) That the evidence was insufficient to justify and there was no evidence to support that portion of the tenth finding of the Superior Court in the equitable issues before it, in which it found that neither T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle or H. C. Newhall did, on the first day of February, 1871, or at any other time, own or were entitled to convey to any one any of the land described in the sixteenth paragraph of said cross-complaint, except a small part thereof, which was described in said tenth finding.

(i) That the evidence was insufficient to justify and there was no evidence to support that portion of the eleventh finding of the Superior Court, upon the equitable issues be-
224 fore it, which is to the effect that Julius C. McCeney on the 19th day of January, 1875, or at any other time, was the owner, and was not entitled to convey any of the land mentioned and described in the deed from said McCeney to said Throckmorton, described in said eleventh finding, save and except that portion of said land which lies within the boundary of said Reed patent.

(j) The evidence was insufficient to justify and there was no evidence to support that portion of the twelfth finding of the Superior Court, upon the equitable issues before it, which is to the effect that none of the grantees named in the deed mentioned or referred to in the 18th paragraph of said cross-complaint purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and rights of the plaintiff, as alleged in his complaint in this action, and that neither the said Throckmorton or his executrix ever had any right to use or improve any part of said lot 3 in section 28, or of said lots 2 and 3 in section 29, and that neither said Throckmorton nor his executrix was ever in the actual possession of the same or

any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff; and the evidence is insufficient to justify, and there is no evidence to support that portion of said twelfth finding which is to the effect that said grantees and each of them, and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by the said deeds, or any part or parcel of said lot 3 in section 28 and said lots 2 and 3 in said section 29, were included within said Mexican grant, and that said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lots 2 and 3 in section 29.

(k) The evidence was insufficient to justify and there was no evidence to support that portion of the thirteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that there is no evidence to show
225 that the evidence introduced in the matter of the application and contest mentioned in the 19th paragraph of said cross-complaint did not show without conflict that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true, but, on the contrary, the evidence did show that all of said facts mentioned were true.

And the evidence is insufficient to show and there is no evidence to show that the evidence introduced in the matter of said application and contest did not establish all of said facts or any material fact in favor of said Throckmorton's right to purchase said land by competent, or any, evidence, and that there was conflict in said evidence and that there was evidence on said contest that contradicted said Throckmorton's evidence, and the evidence alleged in said cross-complaint was not true, but, on the contrary, said evidence did establish all of said facts in favor of Throckmorton's right by competent evidence and without conflict, and there was, in fact, no evidence of said contest which contradicted Throckmorton's evidence, and it fully appeared from the evidence that all the evidence, as alleged in said cross-complaint on said contest, was true;

And the evidence is insufficient to show, and there is no evidence to show that the Register and Receiver of the Land Office at San Francisco did not, nor did either of them, on the 9th day of February, 1866, or at any other time, base their or his decision upon the evidence as the same is alleged in said

cross-complaint, or upon evidence without conflict, but, on the contrary, the evidence fully shows that said Register and Receiver did, on the said 9th day of February, 1886, base their and his decision fully and precisely upon the evidence as the same is alleged in said cross-complaint and upon evidence without conflict;

And the evidence is insufficient to show and there is no evidence to show that the Register and Receiver did not, nor did either of them, rest their or his decision upon the proposition,
or upon a proposition of law, that the said Throck-
226 morton was not in law, or under the law, entitled to
purchase the said land, and that the Commissioner of the General Land Office, upon appeal from the decision of the Register and Receiver, upon the, or upon a proposition of law in deciding that Throckmorton was not entitled to purchase the said land, and that the said Secretary of the Interior did not rest his decision affirming the decision of the Commissioner of the General Land Office upon the, or upon a proposition of law, and that the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of Throckmorton v. Wormouth, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint, but, on the contrary, the evidence showed that each of the said officers of the Land Department, to wit: the Register and Receiver, the Commissioner and the Secretary of the Interior, based his decison and each of said respective decisions upon the proposition of law, to-wit: the proposition that upon all the facts set forth in said cross-complaint, which were duly established before said officers, and each of them, the said Throckmorton was not in law, or under the law, entitled to purchase the said land.

(l) The evidence was insufficient to justify and there was no evidence to support that portion of the fourteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns, and was not entitled to purchase the said land or any part thereof under said act of Congress, and that the Register and Receiver of said Land Office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow plaintiff to make proof and payment for the said land, but, on the contrary, the fact was and the proofs before said

officers showed without conflict that said Throckmorton was a bona fide purchaser from Mexican grantees and their assigns, and was entitled to purchase the said land and
227 every part thereof under said act, and the Register and Receiver of said Land Office did, contrary to law, basing their decision on an erroneous construction of the law applicable to the case before them. allow the plaintiff to make proof and payment for said land, and hold in substance that all of the facts set forth in the cross-complaint herein did not entitle said S. R. Throckmorton to purchase said land.

(m) The evidence was insufficient to justify and there was no evidence to support that portion of the fifteenth finding of the Superior Court upon the equitable issues before it, which is to the effect that said Susanna M. Throckmorton was not the owner of the said land when she executed the said deed, and that she was not entitled to convey the same to said Gardner.

(n) The evidence was insufficient to justify, and there was no evidence to support that portion of the sixteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that Jacob Gardner did not, on the 17th day of July, 1890, or at any other time, enter into the possession thereof, except as an intruder and trespasser.

(o) The evidence was insufficient to justify and there was no evidence to support the seventeenth finding of the Superior Court, upon the equitable issues before it, to the effect that said Jacob Gardner is not, and never was, the owner in equity of said land or any part of the land described in the plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22d paragraph of said cross-complaint, and that said plaintiff does not hold said land, or any part thereof, in trust, or otherwise, or at all, for defendant, Jacob Gardner.

XXXIV.

The said Supreme Court of the State of California erred in that part of its decision contained in his opinion filed in said cause upon appeal, in the following particulars:

228 (a) In deciding that "the principal contention of the defendants for reversal was in relation to what they called their equitable title."

(b) In deciding that the contest of Throckmorton referred

to in said opinion was one entirely within the jurisdiction of the United States Land Department, in that the record on appeal before said Supreme Court showed without conflict that the contest was not within the jurisdiction of said Land Department, in that it involved a judicial question as to the character of the land in controversy, whether, under the treaty of Guadalupe Hidalgo, it became public land of the United States or remained the private holding of private owners.

(c) In deciding that both parties in said contest in said Land Department were endeavoring to get title in which each admitted the land was United States Government land, and was subject to disposition under the laws of the United States, it appearing in said record on appeal without conflict that said proceeding on the part of Throckmorton was not to obtain title to what he admitted to be United States Government land, but was for the sole purpose of obtaining a quitclaim of the Government's interest in said land, and thereby removing a cloud upon his title.

(d) In deciding that the Land Department had exclusive jurisdiction to determine all the facts which arose in said contest.

(e) In deciding that the decision of the Land Department in said contest was a decision upon the issues of fact specified in said opinion, in that the transcript of the proceedings in said Land Department in evidence in said Superior Court, and contained in said record upon appeal, did show conclusively that all the evidence before said Land Department was without any conflict as to any material fact; that there were no issues of fact before the Land Department, and that the only decision of the Land Department was upon the legal effect of the undisputed facts in the record before it.

(f) In deciding that "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or
229 whether after his purchase he used and improved and continued in the possession of the same, according to the lines of his purchase, were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as belief that the land he purchased was included within the original limits of the Mexican grant, were also facts to be determined by that officer, from all the circumstances under which the purchase was made." That the decision in these particulars is erroneous and contrary to the Constitution and laws of the United States, in that the evidence before said Land Department

aforesaid, without any material or substantial conflict whatever, did show that at the time Throckmorton made said application to said Land Department, his right and title to said premises was one that was valid and well vested, and secured to him under said Treaty of Guadalupe Hidalgo, and which had been finally settled and adjudicated in favor of the right and title he claimed by said District Court in its said decree of January 14, 1856, and that by reason of the fact that Throckmorton, at the time of said application, had absolute title to said premises, and as a matter of law, under the Constitution and laws of the United States, the question as to whether he purchased the land for a valuable consideration, or that, that after his purchase, he used, improved and continued in the actual possession of the same, or that that of his good faith in making the purchase, or that that of his belief that the land he purchased was included within the original limits of the Mexican grant, could not be raised in said Interior Department, said Interior Department being concluded, as a matter of law, upon all those facts, and that therefore, there being no issues of facts before said Land Department, the Secretary of the Interior could not render a decision upon any of those facts, but could only render a decision upon the law in the case, and that its decision was therefore but a decision upon the law in the case.

(g) In deciding that the decision of the Secretary of the Interior was not an erroneous application of the law,
230 and in deciding that its decision was based upon facts which necessarily defeated the claim of Throckmorton.

(h) In deciding that the decision of the United States Land Department, accordingly as the same in said record and appeal was conclusive in favor of respondent Wormouth's title.

(i) In deciding that the other points in the case were unnecessary to be discussed.

XXXV.

The Supreme Court of the State of California erred in deciding that the decision of the Land Department was conclusive as to Wormouth's title to the premises in controversy, upon the ground that it amounts to the said appellant, Jacob Gardner, being thereby deprived of his property by the State of California, without due process of law, in deciding that the Land Department, by its decision in said contest before it, between said Throckmorton and said Wormouth, that the de-

cision of said Department adverse to said Throckmorton operated to destroy his right and title to said premises under said treaty.

In order that the foregoing assignment of errors may be and appear of record, the respondents present the same to the Court, and pray for such disposition be made thereof as in accordance with the law and statutes of the United States in such cases made and provided.

Wherefore, the said Jacob Gardner and Peter Gardner, as plaintiffs in error, pray that judgment of said Supreme Court of the State of California, be reversed, and that the judgment of said Superior Court of said State of California, in and for said County of Marin, be likewise reversed, and that said Superior Court be directed to grant a new trial of said case.

[Signed.] GEO. W. MONTEITH,
Attorney for Appellants in said Supreme Court
as Plaintiffs in Error.

[Title of Court and Cause.]

BOND.

Know all men by these presents, That we, Jacob Gardner and Peter Gardner, defendants and appellants and plaintiffs in error, as principals, and Casper J. Gardner and Peter Williams, as sureties, all of the County of Marin and State of California, are held and firmly bound unto Ebenezer Wormouth, plaintiff, respondent and defendant in error, in the full and just sum of two thousand five hundred dollars, to be paid to the said Ebenezer Wormouth or his certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at the Supreme Court of the State of California, upon an appeal depending in said Court, taken by the said Jacob Gardner and Peter Gardner, as appellants therein, from a judgment heretofore rendered in the Superior Court of the State of California, in and for the County of Marin,

against said appellants Jacob Gardner and Peter Gardner, as defendants therein, and in favor of the said Ebenezer Wormouth, as the plaintiff therein, a decision and final judgment was rendered against said appellants Jacob Gardner and Peter Gardner, and in favor of said respondent Ebenezer Wormouth, affirming said judgment of said Superior Court, and the said Jacob Gardner and Peter Gardner having obtained a Writ of Error from the Supreme Court of the United States to reverse the aforesaid judgment of said Supreme Court of the State of California in the aforesaid action, and a citation directed to the said Ebenezer Wormouth citing and admonishing him to appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, upon the 6th day of October, 1899.

Now, the condition of the above obligation is such, that if the said Jacob Gardner and Peter Gardner, as plaintiffs in error upon said Writ of Error, shall prosecute said Writ of Error to effect, and shall answer all damages and costs that shall be awarded against them if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JACOB GARDNER. [Seal.]
PETER GARDNER. [Seal.]
CASPER J. GARDNER. [Seal.]
PETER WILLIAMS. [Seal.]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Casper J. Gardner and Peter Williams, being duly sworn, each for himself, deposes and says that he is a householder in said district, and is worth the sum of two thousand five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Subscribed and sworn to before me, this 8th day of August, A. D. 1899.

CASPER J. GARDNER.
PETER WILLIAMS.

J. S. MANLEY,
Commissioner of U. S. District Court, Northern District of California.

The foregoing bond is hereby approved and ordered filed.

W. H. BEATTY,
Chief Justice of California.

August 8th, 1899.

[Endorsed:] Supreme Court of the State of California. Filed.

GEO. W. ROOT, Clerk.
By A. W. Johnson, Deputy.

[Title of Court and Cause.]

WRIT OF ERROR

United States of America—ss.

The President of the United States to the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California—Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of California, before you, or some of you, being the highest Court of Law or Equity of said State in which the decision could be had in said suit between Jacob Gardner and Peter Gardner, defendants, appellants and plaintiffs in error, and Ebenezer Wormouth, plaintiff, respondent and defendant in error, wherein was drawn in question a title and a right claimed under the Constitution of the United States, and under a treaty of the United States, to wit, the Treaty of Guadalupe Hidalgo, and under the laws of the United States, particularly including an Act of Congress of the United States, entitled "An Act to ascertain and settle the private land claims in the State of California," approved March 3d, 1851, and an Act of Congress entitled "An Act to quiet land titles in California," approved July 23d, 1866, and wherein the decision and the final judgment of the Supreme Court of the State of California were against the right and title set up and claimed under said Constitution, treaty and laws of the United States by the said Jacob Gardner and Peter Gardner, said defendants and appellants therein, that manifest error has happened, to the great damage of the said Jacob Gardner and Peter Gardner, said plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you

send the record and proceedings aforesaid, with all things concerned in the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the seventh day of October next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 8th day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

[L. S.]

[Signed:]

SOUTHARD HOFFMANN,

Clerk of U. S. Circuit Court, Northern District of California.

Allowed by

W. H. BEATTY,

Chief Justice of the Supreme Court of the State of California.

No. 143

Brief of Monteith for P. C. (1899)

FILED
OCT 30 1899
JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Oct. 30, 1899.

JACOB GARDNER, *et al.*,
Plaintiffs in Error,

against

LEWIS H. BONESTEL, Executor of the Estate of EBENEZER WORMOUTH, Deceased,
Defendant in Error.

Objections and Brief of Plaintiffs in Error on Motion to Dismiss and Affirm.

GEO. W. MONTEITH,
Attorney for Plaintiffs in Error.

Filed Oct. 1899.

16965

In the Supreme Court of the United States.

JACOB GARDNER and PETER GARDNER,
Plaintiffs in Error,

vs.

L. H. BONESTELL, Executor of the Estate of EBENEZER WORMOUTH, deceased,
Defendant in Error.

OBJECTIONS OF THE PLAINTIFFS IN ERROR TO THE MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR HEREIN FOR WANT OF JURISDICTION AND TO THE MOTION TO AFFIRM THE JUDGMENT AND DECREE.

I.

The plaintiffs in error object to the motion of the defendant in error to dismiss the writ of error herein for want of jurisdiction and moves that it be denied upon the ground, that upon the face of the showing, made by defendant in error in the brief accompanying the motion, it is manifest, that the same is frivolous and without merit; and the plaintiffs in error make the same objection and motion with reference to the motion of defendant in error, joined therewith, to affirm the judgment and decree said writ of error is prosecuted to review.

II.

The plaintiffs in error object to the hearing of the motion of defendant in error, to dismiss the writ of error herein for want of jurisdiction, upon the ground that the defendant in error has failed to print either the whole of the record herein or sufficient thereof to enable the Court to determine the motion upon its merits, and thereupon plaintiffs in error move the Court that said motion be either denied for that reason or that the hearing of said motion be postponed such reasonable length of time as the Court may prescribe to enable the defendant in error to print the record and upon the condition that if the same be not so printed by the defendant in error within the required time that said motion to dismiss be for that reason denied; and plaintiffs in error make the same motion with reference to the motion of defendant in error to affirm the judgment and decree said writ of error is prosecuted to review.

Respectfully submitted,

GEO. W. MONTEITH,
Attorney for Plaintiffs in Error.

In the Supreme Court of the United States.

JACOB GARDNER and PETER GARDNER,
Plaintiffs in Error,

against

LEWIS H. BONISTELL, Executor of the Estate of EBENEZER WORMOUTH, deceased.

Brief of Plaintiffs in Error.

SYLLABUS.

There were two distinct sets of issues upon two distinct sets of pleadings, separately made up, separately tried, separately decided and incorporated in one judgment, viz: *Legal*, involving the title under a treaty—*Equitable*, involving a right to a patent (in the nature of a quitclaim) under a statute of the United States.

A third issue was also raised as to the jurisdiction of the State Courts to determine these issues. The evidence was without conflict and undisputed and all questions decided, questions of law.

Legal issue, involved our right and title to the land, as a right and title under the treaty of Guadalupe Hidalgo. The U. S. District Court in a final judgment in 1856 confirmed our right, title and possession as a right and title under the treaty. The Land Department more than twenty years thereafter decided the contrary and against our right, wholly as a matter of law. *The State Court's decisions were both against our right, holding purely as a matter of law, that the decision of the Land Department controlled and operated to dispossess us notwithstanding our sixty years' continuous possession, commencing 15 years prior to the treaty, existing when it when into effect and continuing ever since.*

Equitable Issue, involved a specific right, asserted solely as a matter of law to a federal patent to the land, under the 7th Section of Act of July 23d, 1866. "To quiet land titles in California"; a right based wholly upon our absolute title under the treaty; and because the land, although a part of, a Mexican grant, had been excluded from the final survey, by the land department; which upon undisputed evidence (none contrary to our claim) decided against our right, erring in its decision purely as a matter of law. The decision of both State Courts was against the right we claimed under that statute, to the patent (in effect a quitclaim to quiet our title).

Jurisdictional Issue, involved the jurisdiction of the State Courts to determine the subject matter of the controversy which determination as a matter of law, was as to whether the land under the treaty was public or private land; exclusive jurisdiction to determine all such questions having been vested in the Federal Courts under the Act of March 3, 1851.

The above is an abstract of the case and shows nothing but federal questions involved. They were raised in the pleadings, tried and adjudged, and adjudged against us. They are fully covered by the assignments of error a fact not questioned and therefore unnecessary to discuss.

STATEMENT OF THE CASE.

The record in this case, without any material conflict, discloses, that on September 4th, 1834, Juan Reed, or Read, petitioned the Mexican Government to grant him a tract of land known as "El Corte de Madera del Presidio" (the place where wood is cut for the Presidio) (Tr., p. 169). The petition was granted October 2d, 1834 (Tr., p. 169–172). Under the Mexican law it became necessary for the magistrate nearest the land, to make an examination and survey; place him in physical possession; reduce the examination and survey to writing; and annex them to the petition and grant, which together with the *diseno* (a sort of a sketch map of the premises), would constitute the *espediente* or title papers of the grantee. This was all done in due form, and upon Nov. 28th, 1835, Juan Reed was placed in full possession of the rancho. The *espediente* appears on pages 169 to 174 inclusive, and upon pages 329 to 332 inclusive, of the transcript and the *diseno*,

or map, on page 79. They are not, as they should be, together, but will be found on the pages stated. The evidence shows without any material conflict that the land here in controversy is a part of that of which juridical possession was delivered to Juan Reed, Nov. 28, 1835. It also shows that he remained in possession of it down to the time of his death in 1843, when his four children succeeded to his title and possession. One of them, a minor, dying without issue, the other three, John J., Inez and Hilarita, became the sole owners of the rancho, and were in actual possession of it at the time of the Mexican war and of the adoption of the treaty of Guadalupe Hidalgo which provided that :

"Mexicans now established in territories previously belonging to Mexico * * * shall be free to continue where they now reside * * * *retaining the property which they now possess.*"

In order to give full effect to the provisions of the treaty, and to determine in accordance with its provisions, the extent of the public domain in California and where the boundaries lay, that separated the lands of the United States from those of private owners, Congress passed an act on March 3d, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California" (9 Stat. p. 631). Under this act the final and conclusive settlement of all these questions was left *exclusively* to the District Court of the United States in California, subject to an appeal to the United States Supreme Court.

Under this act, proceedings were immediately begun by the Reed heirs against the United States before the Court of Land Commissioners. The usual decree affirming their title in all respects was duly entered June 13th, 1854 (Tr., p. 176–7). The United States appealed the case for a trial *de novo*, in the District Court for the Northern District of California, where the matter was fully heard, and on January 14th, 1856, the United States District Court rendered its decision and made its decree, affirming the judgment of the Board of Land Commissioners in all respects. In his opinion in the case, Judge HOFFMAN remarked :

"The case seems to present one of the few instances where every requirement of the law has been fully complied with."

1 Hoffman, Rep. 75 (Land Cases).

The United States declined to appeal and the decree became final April 2d, 1857 (Tr., p. 181).

In 1858, however, a dispute arose between the Reed heirs and

the United States Land Department as to whether or not the grant was one of specific quantity, to wit: one square league, or was one of specific boundaries without regard to quantity. It was not denied by the Land Department that Reed and his heirs had been granted and were in possession of the rancho as originally prescribed, and which included the land here in controversy, but the Land Department claimed that it had been confirmed to the extent of but one square league and asserted its right to reduce the rancho, from something like 1,500 acres more than a league, to exactly one league, and directed a surveyor by the name of Mathewson to make such a survey. The Reed heirs contested the survey, and while that contest was going on sold one-quarter interest in the excluded portion to Jas. C. Bolton. When the Land Department raised this question, a large number of persons, who in the vernacular of the country are designated "land jumpers" or "squatters" (Wormouth the defendant, in error being among them), conceived the idea that the excluded portion of the land would be open to settlement and immediately asserted their claims. Wormouth, as the record shows, attempted to enter the excluded portion in 1859, but made a mistake ; locating himself upon land which was not only in the original grant, but was included within the Mathewson survey. In 1864 he moved over upon the excluded portion and upon what is now a part of the land in controversy. The excluded portion at the time he went upon it, being in the possession of the Reeds heirs and Bolton. Bolton began suit in the United States Circuit Court in ejectment, and Wormouth was one of the defendants. The case was tried, judgment rendered in favor of the Reed title and Wormouth along with the others ejected September 28th, 1871 (Tr., p. 217). Wormouth again entered the land apparently about 1880 or 1881, and built the house and made the improvements upon which he predicated his homestead entry (Tr., p. 315). He had previously made several attempts to enter the land (Tr., p. 224) and filed several entries, and on May 20th, 1881, he made the final entry upon which he bases his present claim.

The case of Bolton *versus* Van Rynegan, which is the title of the proceedings in the Circuit Court, was appealed to the Supreme Court of the United States and the judgment affirmed by that Court.

Van Rynegan *vs.* Bolton, 95 U. S., 35.

In the meantime the contest in the Land Department upon the

Mathewson Survey had been pending thirteen or fourteen years and on January 6th, 1872, Secretary Delano rendered a decision holding in terms that the grant was one of boundaries and not of quantity, set aside the Mathewson survey and ordered a new survey in conformity to the decree of the District Court. An actual survey was never made in accordance with the ruling of that decision, but a map was compiled by two surveyors, Ransom and Allardt. This was also the subject of a great deal of contest in the Land Department. Two Secretaries of the Interior following Delano, as their public reports show, modified or attempted to set aside the decision of Secretary Delano, and later on Secretary Teller set aside both of their decisions and held that the decision of Secretary Delano was the rule to be followed in the Department, and that no subsequent Secretary had any power to change it under the law. Later on his decision was disregarded and a patent was issued and received by the Reed heirs in 1884, based upon the compilation of Ransom and Allardt (its western boundary following the yellow line on the colored map). The patent radically changes the original grant, it includes a portion that Mathewson excluded ; it excludes, however, the remaining portion of the grant which he excluded and which includes the land in controversy. This compilation also includes a large amount of unoccupied tide or salt-marsh land, which Reed never possessed and which was never included within the boundaries of the grant, indeed, a species of land never included in any Mexican grant ; a fact that stands uncontradicted as a part of the judicial history of this country. The Reeds, however, accepted the patent thirteen years after they had parted with all title to the portion of the grant the Mathewson survey excluded.

Bolton's interest in the excluded portion through mesne conveyances was acquired by S. R. Throckmorton, and the Reed heirs conveyed their interest in the excluded portion to various persons, all of whom on February 1st, 1871, conveyed their interest in the land here in controversy to Julius C. McCeney (Tr., p. 194–6), who received the same in trust for Throckmorton, conveying it to him January 19, 1875 (Tr., p. 196–7). Throckmorton, therefore, in 1875, absolutely succeeded to the entire Reed title to the premises here in controversy.

On October 20th, 1880, Throckmorton, in order to settle the question, remove a cloud upon and fortify his title, made application under an act of Congress entitled "An Act to Quiet Land

Titles in California," approved July 23d, 1866, to the Land Department for a patent, which would have the effect of being a quit-claim of the Government's claim to the land, and his application was contested by Wormouth (Tr., p. 93 to 236 inclusive). In support of his application, Throckmorton proved in the Land Department his title to the premises and also proved *without any evidence to the contrary, that the land here in controversy was a part of the land possessed by the Reeds.* There was no conflict in the evidence before the Land Department whatever, but the Land Department refused his application by a decision of Assistant Secretary Chandler, dated October 24th, 1891. *There were no issues of fact before the Land Department upon this application at all, there being no material conflict in the testimony, and as there was no dispute in the testimony and were no issues of fact to decide,* the decision of the Secretary is, as a consequence, simply *a decision upon the legal effect of the facts proved, standing as admitted facts*—a decision upon the law in the case alone.

While Throckmorton's application was pending before the Interior Department he died, and his only heir and daughter Susanna, succeeded to his estate and she in turn conveyed the property here in controversy to Jacob Gardner.

From 1835 down to the time of the conveyance to Jacob Gardner, the property had been in the lawful possession of Throckmorton, his daughter Susanna and his predecessors in estate, saving that during portions of the time Wormouth forcibly possessed himself of less than one-quarter of the 46 acres here in controversy. Wormouth himself in his testimony admits (Tr., p. 312) that he never was in possession of 33 acres of the 46. Jacob Gardner therefore went into legal possession of all of the property when he obtained his deed July 17th, 1890, and into actual possession of the 33 acres, being forcibly prevented by Wormouth from obtaining physical possession of the other 10 or 11 acres, all of which the record shows without any conflict. The condition as to possession which existed at that time, has existed ever since and still exists, Gardner being now in possession.

On May 20th, 1881, Wormouth filed in the Land Department, his homestead entry for this land. At that time Throckmorton was in lawful possession of it and was in actual possession of all except the portion that Wormouth possessed himself of by his forcible entry.

Upon July 29th, 1892, shortly after the Land Department had

refused Throckmorton's application to obtain the Government patent, Wormouth commenced this action in ejectment in the usual form in which all actions of ejectment are begun in California. (Tr., p. 1 to 9). The Gardners thereupon filed their answer (Tr., p. 9 to 19) and later on by leave of Court (Tr., p 19. to 20) filed a supplementary answer (Tr., p. 20 to 37 inclusive) amending their original answer. At the same time Jacob Gardner also by leave of Court filed his cross-complaint (Tr., p. 37 to 33) to which Wormouth filed his answer (Tr., p. 53a to 531 inclusive.) Two separate sets of issues were thus made up to wit : legal and equitable. They were separately tried, the equitable being tried first. There was no material conflict in the testimony on either branch of the case, no issues of fact made on either trial, notwithstanding which the trial Judge assumed to find upon issues as of fact in spite of the plain fact that the sole issues were issues of law upon uncontroverted facts.

The case was decided in Wormouth's favor by the Superior Court and the Gardners appealed to the State Supreme Court where the issues upon both the legal and equitable branches of the case were extensively argued. In the California Supreme Court the appellant challenged the jurisdiction of the California Courts to determine the legal branch of the case as it was simply a readjudication of a treaty right, that under the Act of March 3d, 1851, the United States Courts had exclusive jurisdiction to determine—in other words a case wherein the Superior Court had undertaken to redetermine whether the land in controversy was, under the treaty of Guadalupe Hidalgo, public or private land. The issues in the Supreme Court were grouped and argued under three heads, to wit : Legal Issues—Equitable Issues—Jurisdictional Issues.

The California Supreme Court affirmed the judgment of the lower Court upon all issues and rendered judgment against the rights asserted under the treaty and the statutes of the United States. In its opinion it declined to discuss the legal and jurisdictional issues and simply discussed the equitable questions.

ARGUMENT.

Explanatory.—In the California Supreme Court, we discussed the case in its several branches, in the natural order—Legal—Equitable—Jurisdictional.

Upon this motion we will temporarily change the order by discussing the equitable issues first, as they bear more clearly and directly upon our first objection; *that the motion is upon its face frivolous.*

In the record the equitable issues rest upon the *cross complaint* of Jacob Gardner; the *answer* of Wormouth thereto; the *evidence* before the Court thereon, of which the *transcript of proceedings* in, and decisions of the Land Department on, are the main and material parts; the *decision* of the Superior Court, denominated "findings of fact and conclusions of law;" the *judgment* of the Superior Court; and, the *opinion* and *judgment* of the State Supreme Court. Of these the defendant in error, in his brief, prints simply the two *pleadings*, the *decision* of the Superior Court, the *judgment* thereof and the *opinion* of the Supreme Court, together with *a few fragments of the evidence*, upon the equitable branch. *The main part of the evidence upon the equitable issues is omitted*, which omission includes the most important parts of the vitally necessary transcript of proceedings in the land department.

Defendant in error in his motion asserts "that the only question involved in said action was a question of fact," etc., and this a most grievous blunder for the record without any question at all discloses *that the trial of neither branch of the case developed any question of fact whatever;* every material question presented for the determination of the Court, being a pure question of law upon the legal effect of evidence in which there was neither material nor substantial conflict; *the material facts all being undisputed and standing in the case as though admitted.* This being the case there could be neither question of fact nor finding of fact and any determination made by the Court in the case whether denominated or labeled "findings of fact" or otherwise must in the nature of things have been a decision upon the law—of the legal effect of facts admitted—admitted because uncontroverted.

First Objection.—This objection must be determined wholly upon the pleadings in the equitable branch of the case—the cross complaint of Jacob Gardner and answer thereto (both printed in our opponent's brief). The decision of the Court, denominated "findings of fact and conclusions of law" must be disregarded, because alone they are incomplete, in that nearly all the evidence in the record upon which they are based, is not printed on the one hand,

and on the other, the fragments printed negatively show (what is actually shown by the whole record) that there were no disputed facts, no issues of fact and no facts to determine, and, therefore, no necessity or warrant for any finding of fact at all. Indeed, the defendant, by printing portions of the record is not thereby entitled to raise a presumption in his own favor that otherwise could not appear. If he prints something that purports to be a finding of fact, he must also print with it, enough, at least, of the record to clearly show that there was an actual issue of fact before that Court upon which it could base a finding of fact—in short, that, whether the decision was of fact or of law, is not to be determined by its label. For these reasons these alleged "findings" must be disregarded.

The pleadings in the equitable issues show clearly that a federal question alone was before the Court for determination, to wit.:

The validity of Gardner's claim as the successor in interest of his predecessor in estate, Throckmorton's to a specific right—*a right* to a United States patent (in the nature of a quit-claim), *under a statute of the United States*, to wit.: "An Act to quiet land titles in California," approved July 23, 1866, 14 Stat. 218, a claim predicated upon *a right* and *a title* claimed solely *under a treaty of the United States*, the treaty of Guadalupe Hidalgo, *and under the* provisions of the *Constitution and laws of the United States*, relative thereto.

This cross complaint alleges all the facts essential to show, that if they are true, the right claimed by Gardner is a valid one and if they are untrue it is invalid.

Its validity or invalidity turns wholly upon the legal effect of the proceedings upon the application of Gardner's predecessor in estate, Throckmorton, in the Land Department. If, as a matter of law, the evidence before the Department established the right of Throckmorton to the patent under the act of 1866, and Gardner in this cross complaint, as his successor, asserts that right as the sole basis of the equitable relief he seeks under his cross complaint, then the only thing that could be put in issue by the answer, and the only thing there would be for the Court to determine would be the validity or invalidity of the right thus specially set up under this statute of the United States, and any decision the Court could render against Gardner, must, of necessity, have

been a decision against a right claimed under a statute of the United States, within the meaning of Sec. 709, Rev. Statutes.

While there were no issues of fact before the Superior Court as the record clearly shows, it is of no moment upon this objection. Defendant has printed none of the evidence showing the existence of any controversy (none being in the record in fact), the presumption is clearly against him and it is that there is no such evidence in the record.

It is simply the decision of the Court upon which its judgment was based. Whether the results it enumerates are decisions of law or findings of fact must be determined wholly by what the evidence in the record discloses. If it discloses no material conflict—no controversy or dispute as to the existence of any material fact—then every result arrived at and every determination made by the Court is nothing else than a conclusion of law upon the legal effect of facts standing as admitted.

Defendant in error then, not having printed anything showing the existence of a single issue of fact, the alleged findings printed must be treated as mere legal conclusions and practically disregarded leaving the pleadings alone from which must be drawn the existence of the federal question essential to the jurisdiction of this Court.

Second Objection.—This objection is based upon the failure of the defendant in error to print the material parts of the record. We hold that the Court cannot go into an examination of *the merits of this motion*, without examining the evidence contained in the record, not to determine any controverted issue of fact or any question of preponderance of evidence or the like, for the evidence being without material conflict stands as though admitted.

This branch of the case in the nature of things must be determined upon what transpired in the land department. To begin with, we assert our original right and title coupled with actual continuous possession of the land since 1835 and which right and title are secured to us wholly by the treaty of Guadalupe Hidalgo and by the Constitution and laws of the United States. The facts, we allege, afford no other legal basis to rest upon. The answer raises some issue upon some of these facts, but the evidence discloses that we fully proved them all—that the *legal effect of the evidence* we produced conclusively established our right and title

to the premises. Not a single one of these facts was controverted by the defendant in error even in the slightest degree. He simply produced his own deraignment of title *from and under the United States*, supplemented by his own oral testimony, and absolutely no other evidence upon this branch of the case, thus admitting every fact we established.

We proved a complete right, title and possession antedating the sovereignty of the United States *against and not under it*, and further proved that our right title and possession had been confirmed *as against the United States* many years before Wormouth applied for a federal patent. Wormouth on his part simply proved a paper title from the Government.

Our own right, title and possession as a basis upon which to predicate our right to a United States patent under the Act of 1866, therefore, stands in the record unquestioned and leaves as the only bone of contention upon the equitable issues as to what transpired in the land department, of which the transcript of proceedings (Tr., 93 to 236) with the decisions of its officers is the only evidence.

Defendant in error prints the decision and a few fragmentary portions of the transcript of proceedings. He asserts that simply "a question of fact," a "boundary" is all involved We assert there was no question of fact at all, simply because our evidence was not contradicted. To therefore determine the merits of this motion, the Court will have to examine the evidence, and we are entitled to discuss it, which we cannot until he prints it, as he is bound to do under the established practice of this Court. We do not ask this Court to look into the record to *decide facts*, but to determine whether or not the Superior Court *did or did not decide facts* and whether it could upon the case presented to it decide any facts. Defendant in error says the Court simply decided a single fact; this we emphatically deny and assert that the records shows that *the facts were all undisputed*, and there being no issue of fact, none could have been found, and that any determination the Court may have made, whether labeled, a finding of fact, or a conclusion of law, was no more and could have been no more than a decision upon the law—upon the legal effect or sufficiency of facts standing as admitted.

In Egan *v.* Hart, 165 U. S., 188, Mr. Justice WHITE, delivering the opinion of the Court, says, "and this Court may for the

purpose, not of deciding facts, but by way of throwing light upon the findings, look into the entire record."

Upon this branch of the case therefore the whole contention is over the decision of the Secretary. Was it a decision upon the law or the facts of the case? The evidence upon which it was based can alone determine and that is in the transcript of its proceedings (*supra*).

If it appears, as we claim, that the evidence was wholly unimpeached and wholly without conflict and that the legal effect of it was to fully establish our claim, but that notwithstanding the Secretary decided against us, his decision was therefore erroneous and we were entitled in a Court of equity to assert the right he thus denied us.

Rector *v.* Gibbon, 111 U. S., 276.
Johnson *v.* Townsly, 13 Wall., 72.
Moore *v.* Robbins, 96 U. S., 530.
Sheply *v.* Cowan, 91 U. S., 330.

While, therefore, as above shown, the Court could upon our first objection deny these motions it could not grant them until after a hearing upon the merits of the motion which requires the record substantially in full and which is not properly before it not having been printed.

LEGAL ISSUES.

Second Objection.—The main legal issues in the case were decided by the Court, a jury being subsequently called to determine simply mere dependent questions as to damage for detention, rental value, etc. The matters determined by the jury are not of any moment upon this appeal, neither do they in any wise affect the legal rights of the parties, and only bind in case the defendant in error succeeds and are to enable the Court to determine the measure of his damage if he has been damaged.

The legal issues were framed upon the complaint which sets up an ordinary action of ejectment such as would commonly be brought against mere naked trespassers or intruders, and which is the customary form in California for raising all questions of title in an ejectment proceeding.

The Gardners as defendants in the State Court, first answer

generally denying the allegations of the complaint, and generally alleging ownership in the premises. They afterwards filed a supplemental or amendatory answer in which they averred specifically the original grant to Juan Reed, and Jacob Gardner's deraignment of a complete title from Reed specifying the mesne conveyances between Reed and Gardner, setting forth the proceedings of confirmation under the Act of March 3d, 1851, including the judgment of the District Court confirming the grant and alleging that the land in controversy was actually included within the boundaries of the grant.

This vitally important supplemental answer is not printed by our opponent, neither does he print the findings upon the issues upon the legal branch of the case, nor the judgment of the Supreme Court nor any of the necessary evidence.

The averments of title in the supplementary answer are substantally the same as those contained in the cross complaint of Jacob Gardner, and it states that its allegations are to further supplement and are in addition to each of the separate answers to the cause of action set forth in the complaint.

The allegations of the answer as amended by the supplemental answer set forth facts which show a complete title and right to the premises in controversy in Jacob Gardner the defendant in that case and the plaintiff in error here, under the treaty of Guadalupe Hidalgo, the Act of March 3d, 1851, and generally under the Constitution and laws of the United States. The title set up there is based upon no other authority or claim of right whatever, and could only be maintained by reason of the treaty of Guadalupe Hidalgo and the laws and Constitution of the United States. It could not have been decided in Jacob Gardner's favor upon any other ground whatever than that it was a right depending upon the provisions of that treaty and of the Constitution and laws of the United States, and the Court could only decide the case against Gardner by holding that Gardner was not thus entitled under the treaty. The evidence before the Court was wholly without any conflict whatever. The only evidence offered on the part of Wormouth was his patent, his homestead proceedings, and his own verbal testimony. He did not offer a scintilla of testimony to dispute the abundant testimony of Gardner that the land in controversy was within the boundaries of the Rancho Corte de Madera del Presidio as confirmed to and long possessed by the heirs of Juan Reed, and the fact that it was a part of the grant

stands as an admitted fact in the case, unimpeached, uncontradicted and unquestioned by as much as a breath of evidence to the contrary. The evidence in the case shows without the slightest conflict that the western boundary of the grant lay west of the land in controversy and upon the blue line shown on the colored map printed in this brief marked "A" to "A2." It also shows without any conflict that the northern boundary follows the waters of the Arroyo Holon, and the record further discloses that there is not a scintilla of evidence to show that the patent line—the yellow line—bounded the grant or was any part of the boundary of the grant. The United States Courts had held, both in the District Court, under the Act of 1851, and in the Circuit Court, in the case of Bolton against Van Rynegan, that the grant was one of specific boundaries and included all the land to which the Reed heirs were possessed and the possession of which they "had long enjoyed."

The decision of the Superior Court denominated "Findings of Fact, etc.," printed by defendant in error, relates solely to the equitable issues separately tried and determined.

The decision of that Court upon the legal issues will be found on pages 355 to 358 of the transcript and is not printed by defendant in error. Omitting the description of property it contains, it is

> "Determining the issues to be disposed of by it, the Court now finds the following facts from the evidence introduced upon this trial, viz.:
>
> 1st. That on the 1st day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of and entitled to the possession of that certain piece or parcel of land." (describing it).
>
> "2nd. That on said 1st day of February, 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same and ousted and ejected the plaintiff from the same * * * and ever since has been wrongfully and withheld and still withhold the possession thereof.
>
> The above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs you that your verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the land in controversy." (Description, etc.)

The above is the decision of the Court that determined the issues of right and title to the land in controversy. Was it decis-

ion of the law or of the facts of the case? Defendant in error says the latter, we claim exactly the contrary; that it was a decision upon the legal effect of undisputed facts. The evidence on this branch of the case will alone determine it, so that the Court can determine whether the Court, in making that decision, decided a federal question within the meaning of Section 709, R. S.

As on the other branch of the case, Wormouth simply produced the paper evidence of his claim if a title *under the United States*. He actually admitted that he never had possession of 33 or 34 of the 46 acres in controversy and only had a forcible possession of the other 12 acres, leaving the *legal possession* of the 12 acres a question of law for the Court to decide; on the other hand, we proved a complete chain of title to the land based upon the Mexican grant to Juan Reed in 1835; a grant finally adjudicated valid by the Federal Courts, under an act of Congress, passed for that purpose, as a specific right and title, depending for its force and effect upon the provisions of the treaty of Guadalupe Hidalgo.

In brief, there was but one question submitted to the Court for decision, viz.:

Which of these two titles was the legal one? That of Gardner which depended wholly upon the treaty or that of Wormouth, which was no more than the title of the United States, whatever it was. In determining this question, the facts being undisputed the Court was compelled to determine the very question the District Court had determined in 1856 to wit: Was this land under the treaty public or private land?

If public land, it was Wormouth's, he being the successor in interest of the United States. If private land, it was Gardner's, he being admittedly the owner of the title of the grantee. Wormouth produced not the slightest evidence to prove the primary title of his grantor, the government, while Gardner did fully prove not only the original title of the Mexican grantees but also proved that as between the government and his predecessors in estate, the Reed heirs, the title had been finally adjudicated against the claim of the United States (Tr., p. 179).

All in the world Wormouth presented in the way of establishing the primary title of the United States, was the naked patent and map upon which it was based—merely the decision of the Land Department, that under the treaty the land in controversy was public and not private land, a decision without any legal force because the Land Department's powers are limited to the disposi-

tion of public land, and what is admittedly so, it has no power to decide a question upon the title of one who holds against and not under the primary sovereign title of the Government. Ordinarily the showing made by Wormouth would be sufficient to establish a *prima facie* right to recover without any further proof of the title of the Government, it being ordinarily presumed that a Government patent implies that the Government title was valid, but there is a very broad and clear exception to that rule. That rule only applies in this case where there is no contest involved as to whether or not the land in controversy, ever was or was not a part of the Federal domain. It only applies in this case where both parties claim the land and neither party claims against the Government, but it cannot ever apply in any case where one of the parties denies the primary right of the Government to the land, and asserts as the basis of his claim a title in no wise dependent upon the primary sovereign title of the United States. In other words, the patent raises no presumption in a case where the United States is a party on one side and persons who claim *against* and *not under* the Federal title, are on the other, and the same rule naturally applies to the successors in interest of the Government and all those who claim against it. The Reed claim being one protected by the treaty and one against the Government, brings the case within the exception to the rule as to the presumptions contained in a Federal patent. This is because, in the case of public land, the Government *grants* the land and the patent is thereby conclusive evidence of title upon all those whose claims are under and not against the original claim of the United States; on the other hand, a patent for land whose title depends upon a treaty, and which antedates the sovereignty of the United States, is no more than a *quitclaim* of any interest of the United States in the land and raises no presumption whatever against the patentee

Adams v Harris 103 U.S. 593
Beard v Federy 3 Wall. 391

It was incumbent upon Wormouth to establish the title of the Government, which he did not do and made no effort to do, therefore, a finding of the Court in his favor without the evidence upon which to base it, and without the benefit of the presumption that would otherwise follow in the case of a patent, would be of no moment whatever. On the other hand, Gardner asserted a right and proved an absolute title to the premises, under the treaty, superior to, and *against that of the Government*, there being no conflict in the evidence, it became a question as stated which

of the two titles was valid? The one which depended upon the treaty or the one granted by the Land Department. The question, pure and simple, was a question as to whether a title which had been accompanied by sixty years' actual possession, and which was protected by the provisions of a treaty of the United States, and fortified by confirmation proceedings under an Act of Congress carrying the treaty into effect, could be set aside upon the mere showing that the Land Department, a branch of the Executive Department of the Government, had decided that the grant was different from what it had been adjudicated to be, and had issued a patent upon its decision. There was nothing else that the Superior Court was called upon to decide with reference to the ownership of this property.

It is more than patent that the Land Department had no such power or authority; *that while it could follow* the requirements of the decree of the District Court, and survey the land *in accordance with it*, it could not change its boundaries, or by refusing to give effect to the decree destroy vested rights under the decree and under the Treaty, upon which the decree was based, of those in possession of the property. Reduced to its last analysis, it places the Superior Court of Marin County, California, in the anomalous position of, not only undertaking to enforce an unauthorized adjudication of the Land Department, in readjudicating a settled title, but absolutely setting aside a decree of a Court of the United States vested with full power and exclusive jurisdiction to determine everything involved in the title to the grant.

Upon appeal to the Supreme Court this question was fully and extensively argued, and in its opinion the Supreme Court of the State of California refused to discuss this vital and all important question, and upon its failure to recognize this question the learned Chief Justice of the California Supreme Court granted this writ of error upon the ground that the California Courts had failed to give effect to a decree of the District Courts, confirming a specific right under the Treaty of Guadalupe Hidalgo.

The question before the Superior Court may be briefly stated thus: Which shall control—the decree of the District Court carrying the treaty into effect, or the decision of the Land Department nullifying it?

In the Supreme Court of California we pointed out specifically that the judicial power of the Land Department in no wise trenched upon the jurisdiction of the Federal Courts; that the judicial

power of the Courts was general in its nature and *was the only power that could be invoked to absolutely determine questions of title as between the Government and those who claim under it on the one hand, and those whose claim was against and who denied the existence at any time of the primary title of the Government* on the other; that the judicial power of the Land Department was merely *incidental to the exercise of its purely executive function* of disposing of public lands of the United States; that it simply had the power in a judicial manner to determine how or in what manner it would dispose of, or as to which of all rival claimants it would grant an admitted title of the Government to public lands. It could dispose of the land after its character was established but could not adjudicate whether it was in truth public land or not.

From this somewhat extended discussion of the case the Court can easily see that unless it denies the motions of the defendant in error upon the showing he makes, it can determine the motions upon the merits only upon a full examination of the whole record and that that under the established practice of this Court can only be had upon his printing the whole record and not merely such parts as might lend color to his side of the question. On this branch of the case he prints only the original complaint and the answer as it existed before amended by the supplemental answer and the judgment leaving out the supplemental answer containing our deraignment of title, all the evidence and the decision of the Court which are all essental to show both the existence of the federal question and that it was specially claimed in the State Courts.

JURISDICTIONAL ISSUES.

In the California Supreme Court we expressly challenged the jurisdiction of the California Courts to determine this controversy.

It is true that upon the original pleadings, the Superior Court had *prima facie* jurisdiction to determine the case, but upon the filing of the supplementary answer, and upon the trial of the case when its real character was developed, it became apparent that all the questions at issue upon both branches of the case, were wholly and exclusively cognizable in the United States Courts. This is particularly true with respect to the issues upon the legal branch of the case, and as a further answer to the claim of the defendant in error, that no Federal questions are raised in this case, we un-

hesitatingly assert that not only is every question in the case a Federal question, *but they are questions which the Federal Courts alone have the power to determine.* The judgment of the Superior Court of Marin County, is nothing more or less than a readjudication of the original claim of the Reed heirs to the Rancho Corte de Madera del Presidio. The United States Court fixed one set of boundaries, and confirmed the possession of the Reeds to the grant within those boundaries, while the Land Department subsequently assumes to fix an entirely different set of boundaries and to change the whole character of the grant. Then the attempt is made to enforce the decree of the Land Department through the medium of the Superior Court of Marin County, California, and to obtain from that Court an adjudication in favor of a different set of boundaries and of a practically different tract of land from that confirmed by the United States District Court. In fixing the boundaries of the grant the United States District Court was simply demarking a line that separated the grant from the public land of the United States. It was saying in effect what was and what was not Government land under the Treaty, and the power to make this decision under the Act of March 3d, 1851, was vested by Congress exclusively in the District Court at *nisi prius* and in the Supreme Court on appeal. *The power to fix and adjudicate the primary sovereign title of the United States to lands in California as between the Government on the one hand and Mexican grantees on the other, was vested solely and exclusively in the Courts of the United States* under the Constitution and particularly in the District and Supreme Courts under the Act of March 3d, 1851. Congress alone can confer specifically the power and jurisdiction to make such an adjudication or determination, and it never conferred it upon any other tribunal than those named, and when the Courts of California undertook to adjudicate this question and alter the effect of the decree of the United States District Court, they exceeded their jurisdiction and their act was void. To show this absence of jurisdiction manifestly requires the record.

REPLY TO DEFENDANT IN ERROR.

Mr. Bonistel, the counsel, who prepared this motion and the brief upon it, certainly has sadly misapprehended this case. It is only in justice to him to say that he only came into the case two weeks before he served the motion upon us.

He naively concedes that the treaty preserved our rights, a tardy concession that if made by his predecessors, would have relieved us of suing out this writ of error, for unfortunately the California Courts decided exactly the contrary, and we must reverse that decision or lose the land we and our predecessors in estate have held and possessed continuously for sixty-five years under a grant recognized by the treaty and confirmed by the United States District Court in a final decree in 1856.

He acknowledges (p. 77) that the only basis for those decisions against us is that the Land Department *decided* against the validity of our right and excluded the land from the final survey. A survey which simply carried into effect *a decision* of the department *upon the legality* of our right and title under the treaty the fact of our possession and the fact the land was within the lines of the grant, as granted to Reed and confirmed by the District Court, to his heirs as a right under the treaty, both stand as admitted, because not disputed.

He does not claim in the slightest degree that this land was not an integral part of that granted to Reed in 1835, possessed by him until his death and by his heirs when the treaty went into effect. He does not deny it is a part of the land which solely as a right and title under the treaty was confirmed to our predecessors by the final decree of the U. S. District Court in 1856. Nor does he dispute our continuous possession by our predecessors and ourselves ever since. He simply says the Land Office *decided* against us. He says two official surveys excluded it, not mentioning them, although the record does—the Mathewson and Ransome-Allardt surveys.

The former excluded it solely because the department claimed the grant to be one of *specific quantity*—one square league—and Mathewson cut off not only this land but a large amount afterwards included by Ransome, and not because it was not within the lines of the grant, but solely to bring the area down to a square league. This survey was set aside January 6th, 1872, by Sec'y Delano, who held the decree of the District Court must be followed. This eliminates that survey from consideration.

Ransome and Allardt then compiled the other "survey," and they took in more land in area than Reed ever claimed to possess, did not in hardly any particular follow the decree, and excluded this land. Neither in the evidence before the Land Department, nor in any af the other evidence in this case is there a single iota

of testimony to gainsay our statement that the controverted land was an integral part of the Reed Grant.

The fact the survey excluded the land is of no moment unless the evidence shows that it substantially followed the decree of the Court. A survey is only conclusive against those who *claim under* and *not against* the primary title of the Government.

If the decree of the District Court gave us Whiteacre, and the Land Department surveyed and decided we were entitled to Blackacre, neither its decision nor its survey could legally operate to dispossess us of and destroy our title to Whiteacre.

Counsel contends the decision of the Land Department "was final upon the rights of Throckmorton," and cites five cases to sustain it, not one of which does anything of the kind. They simply hold the well-established rule that in matters before the Department, *determinable by it*, the Courts will not review *questions of fact* they decide.

In each one of those cases, the parties on both sides *admitted the primary title of the United States*, and conceded the disputed land in each case was originally public land and the questions were all questions as to which of two claimants the Land Office would dispose of an admitted title of the United States. *In this case, on the contrary, we maintain the United States never had any right or title whatever to the land in dispute, and that by the treaty it is ours.*

Counsel next claims we sought the aid of equity to attack Wormouth's patent. We did nothing of the sort. We asserted that it belonged to us; that under the Act of 1866 we were entitled to the patent, and that by reason of an erroneous decision on the law, by the Secretary of the Interior, Wormouth received what belonged to us; as a specific right under the statute of 1866, and that in equity we were entitled to a decree that, as it was ours, he held it in trust for us.

There were no issues of fact before the Court at all on the equity issues, because as heretofore shown no dispute or conflict as to a single material fact. The mere fact the Superior Judge labeled his decision, "findings," etc., does not, as heretofore shown, determine their character.

The case of Egan *vs.* Hart, cited, only holds that where the decision of the Court below could be sustained, as it clearly was in that case, upon grounds other than those involving federal question, this Court was without jurisdiction.

The next point is that it is "but a question of boundary" and three cases cited, none of which have any bearing on this case.

The three cases simply hold that, as between neighbors who have admittedly good titles, the State Courts alone can say where the physical location of the admitted boundary is. That does not affect a case where the primary title to the land as between the Government on the one hand and those who claim against it on the other is in issue even though the title turns upon a single boundary line.

There is no question of a collateral attack of a survey involved here, no question of accuracy or professional fidelity on the part of the surveyor, nor any question as to the survey being erroneous as to any matter of fact.

We attack the authority for the survey, the power of the Land Department to first decide our right and title invalid, and then carry its decision into effect by making a survey in accordance with the lines of its, legally erroneous decision ; issuing a patent based upon it *and thereby depriving us of our land.* We hold that no such proceeding can avail to dispossess us of what is insured to us by the treaty. The Land Department could at most, make a survey and issue a patent to the land confirmed by the decree of the District Court, and if it adopted any other boundaries or assumed to patent any different land, its action so far as it materially varied the express mandates of the decree was wholly void. It could not take from the grant the triangular piece of land shown on the colored map as bounded by the blue and yellow lines (Blue, B to A 2 ; A 2 to B 2 and yellow, B 2 to B) and substitute for it the salt marsh (in green). Reed's heirs possessed the triangular piece and near which contained, as the record shows, the portion of the redwood forest granted to him *and from which the rancho takes its name,* "Rancho Corte Madera del Presidio," place where wood is cut for the Presidio. His petition to the Mexican Government shows (Tr. 166) that being unable to get the Sansalito Ranch he applied for the Corte Madera. Because he could not get the main part of the redwood forest he took the minor portion.

We simply claim that the Land Department was bound on the part of the government to quitclaim to the Reed heirs exactly what they were entitled to hold under the treaty—no more, no less—just that and nothing else.

The decision of Russell *vs.* Maxwell, 158 U. S., 253, simply holds that a survey is not open to collateral attack as to any ques-

tion of fact as to its accuracy as being a correct survey of an admittedly lawful title.

The point that we should have tried to remove the case is puerile. There is no statute authorizing the removal to the Circuit Court of an action between citizens of the State in which the action is brought. It is elementary that jurisdiction is always open to review.

The case as a whole shows that the one thing really at issue is our right to this land under the treaty. It is ours because our Mexican predecessors, the Reed heirs, possessed it when the treaty went into effect and were entitled to retain it as a valid right under that treaty. The final decree of the District Court forever settled the right and the title, and, whenever that right and title are assailed as invalid under the treaty, we have the right to have this Court review any such decision against our right. All the Land Department could lawfully do was to survey the land in accordance with the decree. It could not change or alter it or refuse to give it full effect. If it refused to give effect to the decree which established our right and title under the treaty, such refusal is nothing more or less than a decision against our right, and if a State Court in the face of complete unconflicting and undisputed evidence of our right and title, and of the decree confirming it, refuses to give it effect and bases its refusal solely upon the naked decision of the Land Department, unsupported and unsustained by any evidence, then its decision is a decision against our right and title under the treaty. So with reference to our equitable claim. If we proved without any dispute our complete right and title under the treaty and complied otherwise with the statute, and there was no controversy before the department as to any material fact, and it erroneously decided against us and our claim to the patent, such decision is a decision against a right under a statute of the United States and a decision of a Court based upon and sustaining it without any other basis is likewise, and such adecision may be reviewed in this Court.

THE RULE STATED

In the late case of Capital Bank *v.* Cadiz Bank, 172 U. S., 430, MR. CHIEF JUSTICE FULLER states the test which determines the jurisdiction of this Court under Section 709 R. S.:

"If the denial by the State Court of a right under a statute of the United States is relied on as justifying our interposition, before it can be held that the State Court thus disposed of a Federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that that the right was specifically claimed; or a definite issue as to the possession of the right must be distinctly deducible from the record, without an adverse decision of which the judgment could not have been rendered.

Moreover, even though a Federal question may have been raised and decided, yet if a question, not Federal is also raised and decided, and the decision of that question is sufficient to support a judgment, the Court will not review the judgment."

The three questions here discussed are all strictly Federal questions:

Upon the legal branch of the case it wholly turned upon our right and title under the treaty,—Was it as a matter of law, public or private land? If private land then the title we asserted was admittedly valid. If public land then it might have been Wormouth's. *It required a decision against the treaty right we asserted upon which to base a judgment against us.* Eliminate all our evidence as to our title under the treaty and nothing remains upon which to raise any question at all.

Upon the equitable branch, our claim is wholly upon a right we claimed under the statute of 1866, upon undisputed evidence. Was our claim valid or invalid? There was naught else to decide. no judgment could have been rendered against us without first deciding against our specific right under a specific statute predicated upon a specific right and title under a particular treaty of the United States.

Upon the jurisdictional issues the Court by necessary intendment, held it had jurisdiction to readjudicate our right and title under the treaty, and to render a decision against it.

It was necessary to decide this treaty right to render judgment. That gives jurisdiction (a treaty being the same as a statute in that respect).

California Bank *vs.* Kennedy, 167 U. S., 365.

To raise the Federal question, it is only necessary that the record should show a complete title under the treaty. The treaty need not be specially pleaded.

Hickie *vs.* Starke, 1 Peters, 97.

The question must appear to have arisen by clear and necessary intendment.

Ocean Ins. Co. *vs.* Polleys, 13 Peters, 137.

And to have been necessarily involved.

Armstrong *vs.* Treasurer, 16 Peters, 281.

If the Federal question is presented by the record, and its decision is necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it is as much against the right, within the meaning of the section as if it had been specially referred to and the right directly refused.

Chapman *vs.* Goodnow, 123 U. S., 548.

CONCLUSION.

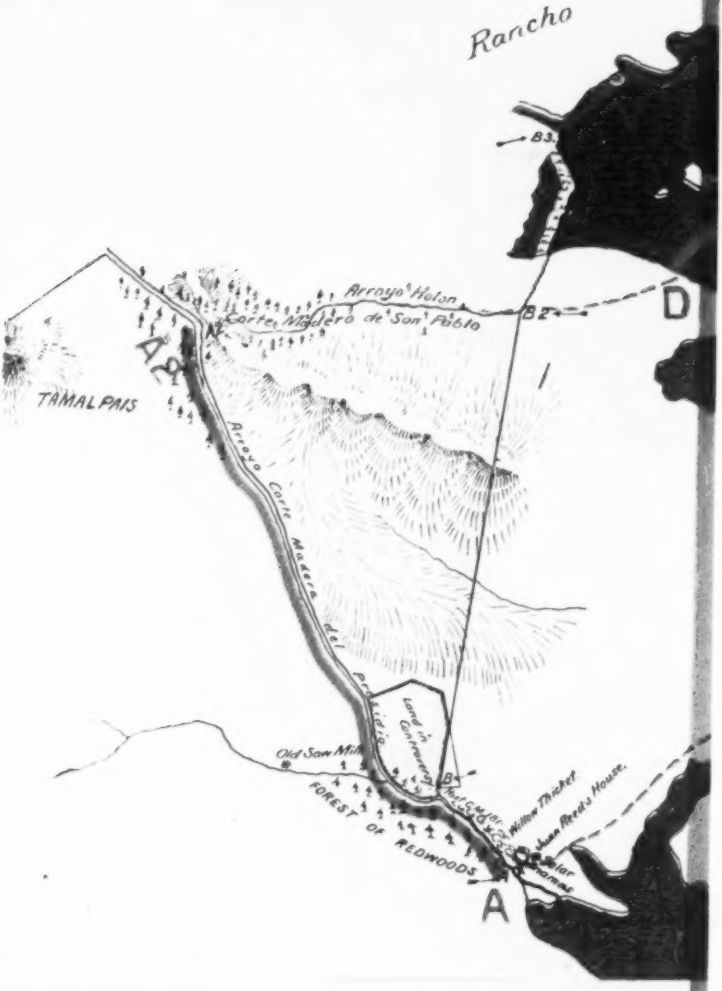
From the foregoing it will be seen that in a large degree the discussion of the merits of this motion argues the whole case and that a discussion of the objection we make necessitates nearly as much.

Our opponent contends that issues of fact were decided in the State Courts, evidently because upon the equitable branch of the case the Superior Court denominated its decision, "findings of fact and conclusions of law." He could not have read the record and arrived at any such result. The facts are wholly undisputed. However, as he makes the claim, he should print either the record or enough of it to *show* that a question of fact was raised that did not involve a federal question and that would support the judgment independent of it. The burden is on him to show it or have his motion denied; if, however, it is on us to establish the negative, then we are clearly entitled to have the whole record printed and thus before the Court together an opportunity to discuss it, either by filing an additional brief or orally as the Court may think best.

We submit, however, that upon the showing made by defendant in error the motions should both be denied.

Respectfully submitted,

GEO. W. MONTEITH,
Attorney for Plaintiffs in Error.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1900.

No. 143.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

vs.

L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED,
DEFENDANT IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR

GEO. W. MONTEITH,
ATTORNEY FOR PLAINTIFFS IN ERROR.

(17,533.)

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INDEX.

SYLLABUS 1
STATEMENT OF THE CASE 3
QUESTIONS INVOLVED 10
SPECIFICATIONS OF ERRORS 16
Ejectment Branch 17
Gardner's Absolute Title 17
Wormouth's Want of Title 28
Question Res Judicata 30
State Courts without jurisdiction 31
Equitable Branch 34
ARGUMENT 41
Legal Issues 41
Preliminary 41
I—Gardner's Absolute Title 45
II—Wormouth's Want of Title 57
III—Question Res Judicata 59
IV—Jurisdiction 60
Equitable Issues 64
V—Wormouth Patent Invalid 65
Patent Held in Trust 70

16981

IN THE SUPREME COURT OF THE UNITED STATES.

JACOB GARDNER AND PETER GARDNER,

Plaintiffs in Error,

vs.

LEWIS H. BONESTELL,

Executor of the Estate of Ebenezer Wormouth, Deceased.

BRIEF OF PLAINTIFFS IN ERROR

SYLLABUS.

There were two distinct sets of issues upon two distinct sets of pleadings, separately made up, separately tried, separately decided and incorporated in one judgment, viz: *Legal*, involving the title under a treaty—*Equitable*, involving a right to a patent (in the nature of a quitclaim) under a statute of the United States.

I. LEGAL ISSUES—Ejectment Proceeding.

Involved the question as to whether or not the land in dispute under the treaty of Guadalupe Hidalgo was public or private land, Gardner holding the Mexican or private land title without dispute and Wormouth claiming to hold a title from the United States. Gardner's title was confirmed by final decree of the District Court of the United States under the Act of March 3d, 1851, confirming the title of the Reed heirs to the Rancho Corte Madera del Presidio. The Land Department excluded this land from the final survey of the grant, and the State Courts held its decision conclusive, though made

upon unconflicting evidence that the land in dispute was a part of that of which juridical possession was delivered to Reed, and operated to dispossess Gardner, notwithstanding the sixty years' continuous occupation by himself and predecessors in estate and not questioning that it was originally an integral part of the grant possessed by Reed's heirs when the treaty was made and the decree of the District Court was entered.

Questions Stated.

First—That Jacob Gardner had absolute title and right to the land in question under the Treaty of Guadalupe Hidalgo, the Act of March 3d, 1851, and the final decree of the District Court of January 14th, 1856.

Second—That Wormouth could not recover in any event because he was without title, owing to the fact the land was actually occupied by another under color of right when he made his entry.

Third—That the Gardner title was *res adjudicata*, and not subject to redetermination in any Court—the State Courts being bound to give full effect to the decree of the District Court.

Fourth—That the State Courts were without jurisdiction of the subject matter of the case—the only question being "Was it public or private land under the treaty?"

II. EQUITABLE ISSUES—To Declare Patent a Trust.

These involved a specific right, asserted solely as a matter of law to a federal patent to the land, under the 7th Section of Act of July 23d, 1866, "To quiet land titles in California"; a right based wholly upon our absolute title under the treaty; and because the land, although a part of a Mexican grant, had been excluded from the final survey by the Land Department; which upon undisputed evidence (none contrary to our claim decided against our right, erring in its decision purely as a matter of law. The decision of both State Courts was against the right we claimed under that statute, to the patent (in effect a quitclaim to quiet our title).

Questions Stated.

Fifth—The absolute right of Gardner's predecessor, Throck-

morton, to the patent under the act upon the simple proof of his absolute title under the treaty, coupled with the fact that the land has been erroneously excluded from the final survey and patent;

Sixth—That the Wormouth patent, having been issued without authority of law ,was void as to Gardner, and constituting a fraud upon his title was in equity held by Wormouth in trust for Gardner's benefit.

STATEMENT OF THE CASE.

The record in this case, without any material conflict, discloses, that on September 4th, 1834, Juan Reed, or Read, petitioned the Mexican Government to grant him a tract of land known as "El Corte de Madera del Presidio" (the place where wood is cut for the Presidio) (Tr., p. 85). The petition was granted October 2d, 1834 (Tr., p. 85-87). Under the Mexican law it became necessary for the magistrate nearest the land to make an examination and survey; place him in physical possession; reduce the examination and survey to writing; and annex them to the petition and grant, which together with the *diseno* (a sort of a sketch map of the premises) would constitute the *expediente* or title papers of the grantee. This was all done in due form, and upon Nov. 28th, 1835, Juan Reed was placed in full possession of the rancho. The *expediente* (title papers) includes the original petition of Juan Reed (Tr., p. 84-85), marked "Ex. D." in the proceedings in the Land Dept. The grant of Gov. Figueroa (Tr., pp. 85-86), marked "Exhibit E" in the same proceedings; the examination (Tr., pp. 86-87) also in the same proceedings; the grant of juridical possession (Tr., pp. 145-146) and the map or *diseno* (Tr., pp. 46A). The land described in the *expediente* is indicated on the colored map as being within the blue lines C to A, A to A2 and A2 to D, the balance of the boundaries being the high water line that excludes the marsh lands, peninsular island and the water. The evidence shows without any material conflict that the land here in controversy is a part of that of which juridical possession was delivered to Juan Reed, Nov. 28th, 1835. It also shows that he remained in possession of it down to the time of his death in 1843, when his four children succeeded to his title and possession. One of them, a minor, dying without issue, the other three, John J., Inez and Hilaria, became the sole owners of the rancho, and were in

actual possession of it at the time of the Mexican war and of the adoption of the treaty of Guadalupe Hidalgo which provides that:

"Mexicans now established in territories previously belonging to Mexico * * * shall be free to continue where they now reside * * * *retaining the property which they now possess.*"

In order to give full effect to the provisions of the treaty, and to determine in accordance with its provisions the extent of the public domain in California and where the boundaries lay that separated the lands of the United States from those of private owners, Congress passed an act on March 3d, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California" (9 Stat. p. 631). Under this act the final and conclusive settlement of all these questions was left *exclusively* to the District Court of the United States in California, subject to an appeal to the United States Supreme Court.

Under this act, proceedings were immediately begun by the Reed heirs against the United States before the Board of Land Commissioners. The usual decree affirming their title in all respects was duly entered June 13th, 1854 (Tr., pp. 88-89). The United States appealed the case for a trial *do novo*, in the District Court for the Northern District of California, where the matter was fully heard, and on January 14th, 1856, the United States District Court rendered its decision and made its decree, affirming the judgment of the Board of Land Commissioners in all respects. In his opinion in the case Judge Hoffman remarked:

"The case seems to present one of the few instances where every requirement of the law has been fully complied with."

1 Hoffman, Rep. 75 (Land Cases).

The United States declined to appeal and the decree became final April 2d, 1857 (Tr., pp. 90-91).

In 1858, however, a dispute arose bewteen the Reed heirs and the United States Land Department as to whether or not the grant was one of specific quantity, to wit: one square league, or was one of specific boundaries without regard to quantity. It was not denied by the Land Department that Reed and his heirs had been granted and were in possession of the rancho as originally prescribed, and which included the

land here in controversy, but the Land Department claimed that it had been confirmed to the extent of but one square league, and asserted its right to reduce the rancho from something like 1,500 acres more than a league to exactly one league, and directed a surveyor by the name of Mathewson to make such a survey. The Reed heirs contested the survey, and while that contest was going on sold one-quarter interest in the excluded portion to Jas. C. Bolton. When the Land Department raised this question, a large number of persons, who in the vernacular of the country are designated "land jumpers" or "squatters" (Wormouth, the defendant in error, being among them), conceived the idea that the excluded portion of the land would be open to settlement and immediately asserted their claims. Wormouth, as the record shows, attempted to enter the excluded portion in 1859, but made a mistake; locating himself upon land which was not only in the original grant, but was included within the Mathewson survey. In 1864 he moved over upon the excluded portion and upon what is now a part of the land in controversy. The excluded portion at the time he went upon it being in the possession of the Reed heirs and Bolton. Bolton began suit in the United States Circuit Court in ejectment, and Wormouth was one of the defendants. The case was tried, judgment rendered in favor of the Reed title and Wormouth along with the others ejected September 28th, 1871 (Tr., pp. 102-108). Wormouth again entered the land apparently about 1880 or 1881, and built the house and made the improvements upon which he predicated his homestead entry (Tr., p. 133). He had previously made several attempts to enter the land (Tr., p. 12") and filed several entries, and on May 20th, 1881, he made the final entry upon which he bases his present claim.

The case of Bolton *vs.* Van Rynegom, which is the title of the proceedings in the Circuit Court, was appealed to the Supreme Court of the United States and the judgment affirmed by that Court.

Van Rynegom *v.* Bolton, 95 U. S., 35.

In the meantime the contest in the Land Department upon the Mathewson survey had been pending thirteen or fourteen years and on January 6th, 1872, Secretary Delano rendered a decision holding in terms that the grant was one of boundaries and not of quantity, set aside the Mathewson survey and ordered a new survey in conformity to the decree of the Dis-

trict Court. An actual survey was never made in accordance with the ruling of that decision, but a map was compiled by two surveyors, Ransom and Allardt. This was also the subject of a great deal of contest in the Land Department. Two Secretaries of the Interior, following Delano, as their public reports show, modified or attempted to set aside the decision of Secretary Delano, and later on Secretary Teller set aside both of their decisions and held that the decision of Secretary Delano was the rule to be followed in the Department, and that no subsequent Secretary had any power to change it under the law. Later on his decision was disregarded and a patent was issued and received by the Reed heirs in 1884, based upon the compilation of Ransom and Allardt (its western boundary following the yellow line on the colored map). The patent radically changes the original grant, it includes a portion that Mathewson excluded; it excludes, however, the remaining portion of the grant which he excluded and which includes the land in controversy. This compilation also includes a large amount of unoccupied tide or salt-marsh land, which Reed never possessed and which was never included within the boundaries of the grant, indeed, a species of land never included in any Mexican grant; a fact that stands uncontradicted as a part of the judicial history of this country. The Reeds, however, accepted the patent thirteen years after they had parted with all title to the portion of the grant the Mathewson survey excluded.

When the Land Department ordered the rancho to be reduced to exactly one square league it was not in anywise because it contended that the Reeds were not or had not been, both at the time of the treaty and long prior, in actual possession of the land within the boundaries specified in the Mexican grant. On the contrary there was no dispute on that at all; the Land Department simply construed the decree of the District Court to confirm the grant as one of *specific quantity* without regard to the amount within the designated boundaries, and *not of particular boundaries* without regard to the quantity. In short, the Department *construed* the decree to confirm the grant as to quantity as against specific boundaries, but by Secretary Delano's decision in 1871 the Department definitely abandoned this contention and ordered a new survey to be made according to the boundaries of the Reeds' actual possession at the time the treaty was made. This the record shows was never made, but a map was compiled by two surveyors,

Ransome and Alfaro, upon which the patent was issued in 1885.

This map and patent wholly violated the boundaries specified in the Mexican grant and as confirmed by the decree of the United States District Court in 1856; it excluded the V-shaped portion of the rancho that on the colored map lies between the yellow line B to B2 and the blue line A to A2 (including the land in controversy), while it included all the marsh land and the "peninsular island" which the Reeds never possessed before the patent issued, and it gave the Reeds nearly two leagues of land. They had already parted with the V-shaped piece, so they by this process received the benefit not only of the original grant but of all these extra thousands of acres, including this valuable island. In the meantime Bolton's interest in the excluded portion through mesne conveyances was acquired by S. R. Throckmorton, and the Reed heirs conveyed their interest in the excluded portion to various persons, all of whom on February 1st, 1871, conveyed their interest in the land here in controversy to Julius C. McCeney (Tr., pp. 98-99), who received the same in trust for Throckmorton, conveying it to him January 19, 1875 (Tr., p. 99). Throckmorton, therefore, in 1875, absolutely succeeded to the entire Reed title to the premises here in controversy.

The title to which Throckmorton succeeded was one never questioned until 1858, when the Land Department construed the grant to be one of specific quantity and not one of specific boundaries. When that contention was declared untenable by the United States Circuit and Supreme Courts in the case of Bolton v. Van Rynegom and abandoned by the Department by Secretary Delano's decision in 1871, it would seem to settle the matter forever, but although that contention was abandoned the Department went to work and issued a patent that in nowise follows the decree of the District Court.

The Reed title was solely a right under the treaty of Guadalupe Hidalgo to the very land the Reeds lawfully possessed when the treaty went into effect and to none other. The Land Department in issuing the patent assumed to dispossess the Reeds' innocent grantees and successors in interest of some hundreds of acres actually within their possession when the treaty was made and went into effect, and in addition to that to turn over to the Reeds a large amount of land they never pretended to have possessed. In short, the United States District Court had judicially determined the extent of the Reed

right, title and possession under the treaty and had definitely fixed the boundaries that separated it from the public domain, while the Land Department assumed to fix a new set of boundaries and redetermine the extent of the Reed holding.

On October 20th, 1880, Throckmorton, in order to settle the question, remove a cloud upon and fortify his title, made application under an act of Congress entitled "An Act to Quiet Land Titles in California," approved July 23d, 1866, to the Land Department for a patent, which would have the effect of being a quitclaim of the Government's claim to the land, and his application was contested by Wormouth (Tr., pp. 46-118 inclusive). In support of his application, Throckmorton proved in the Land Department his title to the premises and also proved *without any evidence to the contrary, that the land here in controversy was a part of the land possessed by the Reeds.* There was no conflict in the evidence before the Land Department whatever, but the Land Department refused his application by a decision of Assistant Secretary Chandler, dated October 24th, 1891. *There were no issues of fact before the Land Department upon this application at all, there being no material conflict in the testimony, and as there was no dispute in the testimony and were no issues of fact to decide*, the decison of the Secretary is, as a consequence, simply *a decision upon the legal effect of the facts proved, standing as admitted facts*—a decision upon the law in the case alone.

While Throckmorton's application was pending before the Interior Department he died, and his only heir and daughter Susanna, succeeded to his estate, and she in turn conveyed the property here in controversy to Jacob Gardner.

From 1835 down to the time of the conveyance to Jacob Gardner, the property had been in the lawful possession of Throckmorton, his daughter Susanna and his predecessors in estate, saving that during portions of the time Wormouth forcibly possessed himself of less than one-quarter of the 46 acres here in controversy. Wormouth himself in his testimony admits (Tr., p. 136) that he never was in possession of 33 acres of the 46. Jacob Gardner, therefore, went into legal possession of all of the property when he obtained his deed July 17th, 1890, and into actual possession of the 33 acres, being forcibly prevented by Wormouth from obtaining physical possession of the other 10 or 11 acres, all of which the record shows without any conflict. The condition as to possession which existed at that time has existed ever since and still exists, Gardner being now in possession.

On May 20th, 1881, Wormouth filed in the Land Department his homestead entry for this land. At that time Throckmorton was in lawful possession of it and was in actual possession of all except the portion that Wormouth possessed himself of by his forcible entry.

Upon July 29th, 1892, shortly after the Land Department had refused Throckmorton's application to obtain the Government patent, Wormouth commenced this action in ejectment in the usual form in which all actions of ejectment are begun in California (Tr., pp. 1-14). The Gardners thereupon filed their answer (Tr., pp. 4-9), and later on by leave of Court (Tr., pp. 19-20), filed a supplementary answer (Tr., pp. 10-18 inclusive), amending their original answer. At the same time Jacob Gardner also by leave of Court filed his cross-complaint (Tr., pp. 18-25), to which Wormouth filed his answer (Tr., pp. 25-30 inclusive). To separate sets of issues were thus made up, to wit: legal and equitable. They were separately tried, the equitable being tried first. There was no material conflict in the testimony on either branch of the case, no issues of fact made on either trial, notwithstanding which the trial Judge assumed to find upon issues as of fact, in spite of the plain fact that the sole issues were issues of law upon uncontroverted facts.

The equitable issues turn wholly upon the proceedings in the Land Department (Tr., pp. 46-118 inclusive), and the findings in that branch of the case (Tr., pp. 31-36). The legal issues are to be determined upon all the evidence printed, except the oral testimony of E. Wormouth on the equitable branch. By stipulation (Tr., p. 155), all the written evidence upon the equitable branch is in evidence on the legal branch of the case, and this includes the transcript of proceedings in the Land Department.

The case was decided in Wormouth's favor by the Superior Court, and the Gardners appealed to the State Supreme Court, where the issues upon both the legal and equitable branches of the case were extensively argued. In the California Supreme Court the appellant challenged the jurisdiction of the California Courts to determine the legal branch of the case as it was simply a readjudication of a treaty right, that under the Act of March 3d, 1851, the United States Courts had exclusive jurisdiction to determine—in other words, a case wherein the Superior Court had undertaken to redetermine whether the land in controversy was, under the treaty of

Guadalupe Hidalgo, public or private land. The issues in the Supreme Court were grouped and argued under two heads to wit: Part I—LEGAL ISSUES; Part II—EQUITABLE ISSUES.

QUESTIONS INVOLVED.

The main controversy here is over the answer to the following question:

Was the land in dispute under the Treaty of Guadalupe Hidalgo public or private land?

Manifestly under the Act of March 3d, 1851, the United States District Court settled that question legally forever, when it made its final decree on January 14th, 1856, wherein it held in terms that the grant was in all respects valid, accordingly as juridical possession had been delivered to Juan Reed in 1835.

The land then actually delivered to Reed included the controverted premises, and was thereafter held by him as an integral portion of the "Rancho Corte Madera del Presidio" until his death in 1843, and thereafter by his heirs, whose lawful successor by mesne conveyance Jacob Gardner, plaintiff in error, is.

It is conceded that Gardner holds the Reed title to the land in dispute, and that he and his predecessors in estate have held actual and continuous possession of the land under that title from the day juridical possession was delivered in 1835 to Reed down to the present time (saving that Wormouth forcibly possessed himself of a few acres which he has since forcibly held; a fact which in nowise affects Gardner's legal rights).

There are two titles before the Court:

First—That of Gardner from Mexico, which long antedates the American conquest and the treaty.

Second—That of Wormouth from the United States, acquired long after the conquest and treaty.

That Gardner has the Mexican title is unquestioned.

That Wormouth holds wholly under the United States is not denied, but the validity of his title from the United States is not admitted (because Gardner's predecessor was in possession when the entry was made, see point II post page et seq.)

That there was no dispute about the land in controversy being private land under the treaty down to 1859 is not gainsaid.

The whole dispute originally grew out of *the contention of the*

Land Department that the decree of the District Court only confirmed the grant *as one of specific quantity*—one square league—and its attempting to reduce the actual possession of the Reeds to one square league by lopping off the 1,500 acres its specified boundaries included in excess of a league.

The dispute in 1859 was simply a question *as to the effect of the decree*—if it was one of specific quantity the Land Department must follow its mandate and reduce it accordingly, *but if one of specific boundaries regardless of quantity*, then its survey must conform to the lines laid down in the decree. The duty of the Department was purely ministerial—an executive function. When the Department had Mathewson survey it in accordance with its contention, it caused him to cut out the 1,500 acres in excess of a league, and Wormouth among others thinking it was Government land—was a part of the public domain—proceeded to "jump" the excluded lands in an effort to get title from the United States. *Clearly Wormouth's right was wholly dependant upon the correctness of the contention of the Land Department* that the confirmation was to the extent of a league only—in short, *if it was a grant of specific quantity, the excluded portion was part of the Federal domain*, and under proper conditions subject to Wormouth's entry, *but if not a grant of specific quantity, but a grant by definite boundaries*, regardless of quantity, then manifestly the 1,500 acres excluded was unlawfully excluded *and the land was under the treaty private not public land*, and of course not subject to entry. There being no question as to the Reeds having possession of the land according to its boundaries (which includes the land in dispute) the only question was, Were they holding too much or not? If the decree so held, the Land Department must cut it down—if it did not so hold, the Department was powerless to change the Reeds possessions; for its duty—purely ministerial—*was to survey the land in accordance with the decree and upon the lines of the Reeds possessions; they conforming to the decree.*

The Department could only follow the decree and could lawfully in nowise alter its effect.

But the Department in 1859 followed its own construction of the decree, and by the Mathewson survey reduced the grant to one square league.

The Reeds and their successors in interest fought this bitterly by a contest in the Department and by an action in the United States Circuit Court in ejectment (Tr., pp. 102-109).

against the squatters who had settled in the excluded portion. (Wormouth's name was misprinted "Edward Wormouth." Wormouth says (Tr., p. 76), he was a defendant).

The Department through Secretary Delano in 1871 sustained the Reed contention, and held the grant to be one of boundaries, and ordered a new survey *in accordance with the decree*.

In the Circuit Court, and in the ejectment case, the Reed contention was again upheld and the grant in that case (entitled Bolton v. Van Rynegom et al.) held to be one of boundaries—a decision affirmed on appeal by the Supreme Court of the United States.

Bolton *v.* Van Rynegom, 95 U. S. 33.

These two decisions effectually quieted the contention that the grant was one of specific quantity and left the Land Department but one thing to do, and that one thing it never did, viz: to survey the grant in accordance with the decree of the District Court.

On the contrary it simply *compiled a map* (Tr., p. 68), and in 1885 issued to the Reeds a patent in conformity to this map.

By this proceeding the Department included *but a portion of the 1,500 acres Mathewson had excluded* to reduce the grant to a square league, leaving out the balance of the 1,500 acres of the original Reed possession (which last excluded portion includes the land in question and on the colored map lies between the blue line "A" to "A2" and the yellow line "B" to "B2"; then more than that the Department patented to the Reeds all the marsh land (in green) and the large "Peninsular Island," none of which the Reeds ever before possessed and all of which lay outside of the original grant to Juan Reed in 1834 *and never before either claimed or possessed by him or his heirs*. The Reeds having, long before this patent issued, sold all their interest in the 1,500 acres Mathewson excluded, their acceptance of the patent in 1885 could not operate to injure their successors in interest.

It will be seen that the Land Department clearly exceeded its authority when it so flagrantly violated the requirements of the decree of the District Court, for its action was tantamount to assuming to readjudicate the question decided by the District Court as to where the boundaries lay that separated the public domain from the private lands of the heirs of Juan Reed.

The District Court decreed one set of boundaries, which included the land in controversy within the grant, while the Land Depart-

ment surveyed another set of boundaries, which excludes the land in controversy.

The District Court held this land under the provisions of the treaty private land, while the Land Department held it to be public land; the latter permitted Wormouth to enter the land *while Gardner's predecessor in estate (Throckmorton) was in actual possession, and issued him a patent*, upon which, together with his forcible entry, he bases his action in ejectment herein.

The Superior Court held with the Land Department and the State Supreme Court affirmed its judgment, both holding in effect that the Land Department had full power to practically readjudicate the grant—a power the Act of March 3d, 1851, conferred exclusively on the District Court, subject to an appeal to the United States Supreme Court. *The State Courts adjudged the patent to be conclusive upon Jacob Gardner*, whose claim was wholly *against and not under* the United States, and held in effect that the Department could decide issues of title and estate to and in land between litigants wherein one claimed title under and others who claimed title against the United States.

While the Reed patent was under discussion in the Land Department, Throckmorton, Gardner's predecessor in estate, made application to the Department for a patent (in the nature of a quitclaim) under the Act of July 23d, 1866 (14 Stat. 218).

This application was contested by Wormouth, and was tried in the Department (Tr., pp. 46-118). Throckmorton proved his title and possession without a scintilla of legal or material evidence against him. There was no conflict in the evidence at all, and consequently no issues of fact to decide. The Department rendered a decision (Tr., p. 126) against Throckmorton; a decision necessarily of law, for the facts being undisputed it could not be otherwise.

When Wormouth filed his application for a homestead in 1881 (Tr., p. 132) Throckmorton, Gardner's predecessor, was in possession of all saving the small amount Wormouth forcibly held.

Wormouth completed his proofs in a formal way soon after Throckmorton's application had been rejected and received a final receipt, July 22d, 1892 (Tr., p. 133), and August 14th, 1893, received his patent, the latter being received after this action was commenced.

At the time Wormouth received his final receipt he was in possession of a small portion of the land in controversy (see dotted line on map on transcript, p. 120 C). The dotted line it will be seen shows the fence that Wormouth put up when he took forcible possession and had made his entry partly upon the patented land.

Therefore, at the time Wormouth got his final receipt, he forcibly held that portion of the disputed premises that is within that dotted line marked "old fence," while Gardner was in possession of the balance, or this is the condition that still exists. Before permitting Wormouth to enter the land and make his proofs, the Land Department was fully informed on the subject, as the records show, never caused any action to be brought by the United States to oust Gardner or any of his predecessors *who had held this land continuously for nearly sixty years under a title against the Government.* In other words, the Government had done nothing to obtain a judicial determination that the land was a part of the public domain, and the only basis upon which that rested was the act of the Land Department compiling the map which excluded the land in dispute.

As a result we have these two contending parties claiming the land, the one standing in the shoes of the Mexican grantee and the other in the shoes of the United States; the one holding the Mexican title and the other holding the American title. The American title was one based purely upon the conquest, which the Mexican title long antedated. Therefore, that act determined which title should prevail, and that was a treaty between the conqueror and the conquered; that treaty was the treaty of Guadalupe Hidalgo. By the terms of that treaty all of the land which passed under the sovereignty and jurisdiction of the United States became part of the Federal domain, saving that which had been previously granted to private owners and was at the time of the conquest held by them.

The evidence in this case shows conclusively without any material conflict that the "Reed Ranch," as the grant is popularly known, was the private holding of the Reed heirs at the time the treaty went into effect. It likewise shows that the land in controversy was an integral part thereof, and that it was so decreed by the United States District Court in 1856 in a final decree.

The question before the District Court was whether or not the land in actual possession of the Reeds, each and every part

thereof including this, was or was not part of the public domain. It was the Mexican title against the American title, and that is the identical question and the only real question that lay between the contending parties in this case at the time Wormouth received his final receipt. It was that question which his ejectment suit presented to the Superior Court for adjudication, and therefore the Superior Court simply held exactly contrary to that held by the District Court in 1856, and denied to the successors of the Reeds the lawful effect of the final decree of the United States Courts in their favor.

After these issues were made up, and before the trial, Wormouth obtained his patent and Gardner filed a cross-suit, claiming that in equity Wormouth held the patent in trust for him, and these equitable issues are likewise concluded by the same proposition, to wit: that the absolute title of the Reed heirs and their successors under the treaty conclusively entitles them in equity to any patent the Land Department may have erroneously issued.

The jurisdiction of the State Courts to redetermine this question of right and title under the treaty which by act of March 3d, 1851, was vested exclusively in the Courts of the United States was clearly questioned in the State Courts.

The judgment of the Superior Court was affirmed by the Supreme Court in all respects, and in its opinion it declines to discuss the legal and jurisdictional issues exhaustively argued and presented to it for its decision. As there is no question raised about this by the defendant in error, that the briefs in the State Supreme Court show this fact they have not been printed, although they appear in the original transcript.

The opinion of the State Supreme Court is in some respects misleading. For example it says (Tr., p. 169):

> "The principal contention of the defendants for a "reversal is in relation to what they call their equitable "title."

This is clearly wrong, for as the foregoing statement shows and as the record establishes beyond controversy, that the principal contention *was that we made under the legal issues*, in the ejectment part of the case, that we had an absolute right and title to this land, while the equitable issue was secondary and dependant upon that claim.

The opinion further says (Tr., p. 170):

> "That contest was one entirely within the jurisdic-
> "tion of the Land Department; that is, each party was
> "endeavoring to get title to what each admitted to be
> "United States Government land which was subject to
> "disposition under the laws of the United States."

There is nothing anywhere in the record that shows anything of the kind, but, as we have already shown, neither we nor any of our predecessors have ever admitted that the land in controversy was United States Government land. The proceedings in the Land Department under the act of 1866 were purely to obtain a quitclaim from the Government, to remove the cloud from our title, and there is nothing anywhere in the record that shows that it was "United States Government land" or was subject to disposition by the Government. The record shows exactly the contrary, and the act itself was an act to "quiet titles" and not to grant them.

Again the opinion states at the end:

> "What appellant (ourselves) claims as his legal title
> "was presented to the jury in the shape of an issue as
> "the damages for detention of the land."

This is radically wrong, for in no way, shape or manner, nor at any time, did we ever ask for any damages; our opponent did, however, and that was the only question determined by the jury, because by stipulation (Tr., p. 137) the main case was decided by the Court.

At the time the opinion was filed we felt upon reading it that because of the number of erroneous statements it contained as to the record the Court must have misapprehended the case, and for that reason filed a petition for rehearing, pointing out the facts; the State Supreme Court without any further opinion made an order in the following language "rehearing denied," thereupon the learned Chief Justice of the State Supreme Court promptly granted this writ of error.

SPECIFICATION OF ERRORS.

Plaintiff in error specifies the following errors contained in the assignment of errors upon which he relies, to wit:

Part First—EJECTMENT BRANCH OF CASE (Legal Issues).

1—*Gardner's Absolute Title.*

I.

The said Supreme Court of the State of California erred in affirming the judgment of the Superior Court of said State, in and for the County of Marin therein, in the following particulars, to-wit:

(a) In holding and deciding that the finding of said Superior Court upon the evidence before it, to-wit:

"1st. That on the first day of February, A. D. 1891, plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:" (particularly describing the land that was the subject matter of the cause of action then pending between the parties hereto in said Superior Court), was sustained by the evidence in the case.

(b) In not holding and deciding that the said plaintiff therein, Ebenezer Wormouth, was not the owner of the land in controversy, or any part thereof, in that the evidence in said case did show without any material or substantial conflict whatever that the defendant therein, Jacob Gardner, was, on the first day of February, A. D. 1891, the owner of said premises then in the possession thereof, and then entitled to the possession thereof, and from thence hitherto had been the owner, and entitled to the possession thereof, and that his ownership and title to said premises was, by reason of his being through mesne conveyances there in evidence, the successor in interest of John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who, at the time of the acquisition of California from the Mexican government, were the Mexican owners of the premises, and under the Treaty of Guadalupe Hidalgo entitled to remain in possession thereof at that time (their right thereto having been confirmed by the United States District Court for the Northern District of California, in a proper proceeding concerning the same, under the Act of Congress of

March 23, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California."

(c) In holding and deciding that the finding of said Superior Court, to-wit

"That on said first day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without any right and title, wrongfully and unlawfully entered into and upon the same and ousted and ejected plaintiff from the same" (excepting certain specific portions), was sustained by the evidence in said case.

(d) In not holding and deciding that upon the first day of February, A. D. 1891, the said defendant, Jacob Gardner, was lawfully in the possession of said land and premises under a title, right and possession acquired by him through mesne conveyances from Juan Reed, who, in 1835, had obtained a valid title to said premises from the Mexican government, and whose heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, at the time the Treaty of Guadalupe Hidalgo was made, were in possession of, and who were entitled thereto under said treaty, and who from the time of said treaty, by themselves and by their successors, including said Jacob Gardner, had been in lawful, continuous, actual and adverse possession of said premises from the month of November, 1835, down to and including the said first day of February, A. D. 1891.

(e) In not holding and deciding that the evidence before said Superior Court, as contained in the record upon the appeal therefrom to said Supreme Court of said State of California, did show, without any material or substantial conflict, that Jacob Gardner was the owner of said premises, in the possession thereof, and entitled to a possession thereof, under a valid and vested right and title thereto, under the Constitution and laws of the United States, and under the Treaty of Guadalupe Hidalgo, and as the lawful successor in interest of the said John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, to whom the same had been decreed by the United States District Court in and for the Northern District of California.

IX.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not re-

versing the same, upon the ground that the finding of the Superior Court, to-wit:

"2nd. That on said first day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said lands and premises the defendants, without right or title, wrongfully and unlawfully entered into and upon the same," and ousted and ejected plaintiff from the same (excepting a certain portion thereof therein described), was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence.

X.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the instruction of said Superior Court to the jury upon the trial in said Superior Court, whereby said jury was instructed that its verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence in that the evidence without any material or substantial conflict showed an absolute right and title thereto in said Jacob Gardner, under said treaty and the Constitution and laws of the United States.

XI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the finding of said Superior Court, and the verdict of the jury therein, upon which said judgment was based, were under the Constitution, treaties and laws of the United States wholly unsupported and unsustained by the evidence, and were contrary to the same adduced upon the trial in said Superior Court, it appearing in the record on appeal before said Supreme Court, without any material or substantial conflict, that said Jacob Gardner held absolute right and title thereto, under the provisions of said treaty and the laws of the United States relating thereto.

XII.

The Supreme Court of the State of California erred in affirm-

ing the judgment of said Superior Court, and in not reversing the same, upon the ground that the evidence before said Superior Court appearing in the record on appeal before said Supreme Court, did show, without any material or substantial conflict, that the lands in controversy lay east of the western boundary of the Rancho Corte Madera del Presidio, and were included therein, accordingly as the same were possessed by Juan Reed from November, 1835, and by him down to the time of his death, by his heirs after his death, and by their successors in interest, down to and including the said defendant therein, Jacob Gardner, secured by said treaty and the Constitution and laws of the United States.

XIII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence before said Superior Court, without any material or substantial conflict, that the premises in controversy were included within the boundaries of the Rancho Corte Madera del Presidio, accordingly as the same were secured by said treaty and confirmed to the heirs of Juan Reed by the final decree of the United States District Court of the Northern District of California, of January 14, 1856, and because that the title and interest of the said heirs of the said Reed to the premises in controversy had become vested in said defendant, Jacob Gardner, through mesne conveyances from their successors in interest.

XIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed title to the premises in controversy, under the treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who became then possessed thereof and was possessed thereof from that time until his death in 1843, at which time his title and possession of said premises descended and became vested in and were possessed

by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who as his heirs, and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California in a decree which became final and filed in said District Court January 14, 1856; the title of said heirs of said Juan Reed thereto, through mesne conveyances upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid title claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said title claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and because the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same; and because, by reason of said decision of said Supreme Court of the State of California affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his title to said premises duly claimed by him and duly vested in him by reason of said Treaty of Guadalupe Hidalgo and by reason of the Con-

stitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed right and title to the premises in controversy, under the Treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who then became possessed thereof, and was possessed thereof from that time until his death in 1843, at which time his right and possession of said premises descended and became vested in and were possessed by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who, as his heirs and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California, and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid, were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California, in a decree which became final, and filed in said District Court, January 14, 1856; the right of said heirs of said Juan Reed thereto, through mesne conveyances, upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court,

the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid right claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said right claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and before the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same. And because, by reason of said decision of said Supreme Court of the State of California, affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his right to said premises duly claimed by him and duly vested in him, by reason of said Treaty of Guadalupe Hidalgo, and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said title of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said right of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXIV.

That said Supreme Court of the State of California erred in

not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was against the right and title of said Jacob Gardner to said premises as secured to his predecessors by said Treaty of Guadalupe Hidalgo.

XXVI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, on the ground that the title and the right was one insured and guaranteed to the said heirs of said Juan Reed, and to their successors in interest, including said defendant, Jacob Gardner, under said Act of Congress of March 3, 1851, to the premises in controversy.

XXVIII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the sole question of right and title to the premises in controversy, before said Superior Court, was upon the validity of the right and title to said premises claimed by said Jacob Gardner, whose claim was that, as the successor in interest of said Reed heirs, the Mexicans who owned and possessed said premises at the time said treaty was executed and went into effect, his right and title to said premises which was secured to said Reed heirs by said treaty, and of the Constitution and laws of the United States relating thereto, and which had been confirmed to them by said United States District Court of the Northern District of California, by its said decree of January 14, 1856, and that his ownership of said premises was the same ownership as their ownership and as their lawful successor in interest thereto, and that their possession beginning with that of their ancestor, Juan Reed, in November, 1835, had continued uninterruptedly through them and their several successors in interest down to and including the said Jacob Gardner, at the time of the commencement of said action, and ever since, and that his said right and title to said premises was the only issue before said Superior Court, upon which it based the following findings, to-wit:

1st. That on the 1st day of February, A. D. 1891, the plain-

tiff, Ebenezer Wormouth, was and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning, being lot 3 of Section 28, and lot 3 of Section 29, township 1 north, of Range No. 6 west, M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining." And that the judgment of said Superior Court, being based upon that finding and decision against said title and right claimed under said treaty by the said Gardner, was contrary to the provisions of the Constitution, treaties and laws of the United States relating thereto, and operated to destroy, set aside and annul a valid and vested right and title belonging to the said Gardner under the provisions of said treaty, and the Constitution and laws of the United States.

XXIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that there was no evidence before said Superior Court upon which there was raised any material or substantial issue of fact upon any point or question involved in said claim of right and title of said Jacob Gardner, under said treaty, and there was nothing to sustain said finding set out in the preceding assignment of error number XXVIII, and that said finding of said Superior Court was found by said Superior Court solely because it appeared that the said Land Department had issued a patent to said Reed heirs after they had parted with their title and possession to the premises in controversy to certain of their successors in

estate, who were the predecessors in estate of the said Jacob Gardner, and which patent fixed the boundaries of said Rancho Corte Madera del Presidio upon different lines from those established by said decree of said United States District Court, of January 14, 1856, in this, to-wit: the said decree of said United States District Court adjudged said boundaries to be the same as laid down in the original grant of said rancho to said Juan Reed in 1835, and which grant of possession fixed the western boundary of said rancho upon a line that ran west of the premises in controversy, and which began as therein specified at the "solar" or house lot of the said Juan Reed, and thence ran north to the waters of the Arroyo Holon, and that the northern boundary of said rancho, beginning where said western boundary ended at a forest of redwoods in said Arroyo Holon, continued eastwardly along the waters of said Arroyo Holon, and that said western and northern boundaries as laid down and fixed in said grant of possession to said Juan Reed which was confirmed by and which became a part of said decree of said District Court, including the premises in controversy, within the boundaries of said rancho, and the said rancho, according to said boundaries, and after his death, as aforesaid, his said heirs went into possession thereof, and continued in actual possession thereof until they conveyed the same to the predecessors of said Jacob Gardner, as alleged in the cross-complaint of Jacob Gardner in said Superior Court.

That according to said grant of possession to said Juan Reed, confirmed by said District Court, as aforesaid, the said western boundary beginning at said "solar" as aforesaid, went thence west of north accordingly as exemplified therein, and particularly in the map attached to said grant of possession.

That said patent issued by said Land Department to said Reed heirs was issued upon the 25th day of February, 1885, and the boundaries of said grant, according to said patent, did not commence at said "solar" or house lot, but, on the contrary, commenced at another point about three-quarters of a mile therefrom, and which point was pretended to be said "solar," and they ran said boundary from said pretended "solar" thence south to the Arroyo Corte Madera del Presidio, upon an entirely different line from that fixed and specified by said decree of said District Court, to-wit: said boundaries as laid down in said grant of possession to said Juan Reed; that the western boundary of said rancho, according to said patent, ended at said pretended "solar," and ran east of the

premises in controversy, and wholly excluded from the northern boundary of said rancho the waters of said Arroyo Holon; that said western boundary, according to said patent, beginning at its southernmost point, ran east of north, as against that of said grant of possession, which ran west of north; that said map was based upon a map compiled in said Land Office, and which map was not made lawfully upon a survey under the laws of the United States; that in the evidence in said Superior Court, it was proved, without any material or substantial conflict, that said "solar" was located where said defendant, Jacob Gardner, claimed the same was located, and where the decree of said District Court located it, and said evidence also proved, without any conflict whatever, that the western boundary of said rancho lay west of the premises in controversy and not east of them; that there was no evidence in said record to in any wise sustain, or that even tended to show that the western boundary line contained in said patent conformed in any respect to said decree of said District Court, but on the contrary said evidence, without any material and substantial conflict whatever, showed that said western boundary lay west of said premises, and not east thereof, and that the line as delineated and laid down in said patent in no wise followed the decree of said District Court, but on the contrary said patent specified that the boundaries of said grant commencing at the "solar" went south to the Arroyo Corte Madera del Presidio, wholly contrary to said decree, and in violation of its express mandate, but was made solely by said Land Department, and was made without authority of law.

That the whole basis upon which said finding of said Superior Court was based was the mere fact that said Land Department, in compiling its map and survey, and in issuing its patent, had thereby excluded the premises in controversy from said rancho, contrary to said decree of said United States District Court, and notwithstanding that no court of competent jurisdiction had ever decreed otherwise than said District Court, and that the said Jacob Gardner and his predecessors in estate had held actual, continuous and adverse and lawful possession of said premises from the time the same was originally granted to said Juan Reed in November, 1835, as aforesaid, down to the time of the commencement of said action in said Superior Court, and ever since, and notwithstanding that the right and title of the said Jacob Gardner to said premises was

a right claimed and held under said Treaty of Guadalupe Hidalgo, under said decree of said District Court, and under the Constitution and laws of the United States, and which had been finally settled and adjudicated.

II—*Wormouth's Want of Title.*

II.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that it appeared in evidence in the record before said Supreme Court, without any material or substantial conflict, that under the Constitution and laws of the United States the right and title claimed by the said plaintiff Wormouth to the premises was invalid, and was based upon and under a pretended homestead entry that had been made by the said Wormouth in the United States Land Office at San Francisco, California, and that was predicated upon a forcible entry of the said Wormouth into a portion of the premises in controversy, at a time when the predecessors in interest of the said Jacob Gardner were in lawful, actual, exclusive and adverse possession thereof, and at a time when the United States was not in possession of any portion thereof.

III.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the title claimed by said plaintiff Wormouth was one based wholly upon and under the laws of the United States, with reference to the disposition and sale of the public lands of the United States by the United States Land Department, and was one wherein the officers of said Land Department had assumed to convey to the said Wormouth the premises in controversy, which the evidence in the record before said Supreme Court did show, without any material or substantial conflict, never was a part of, and never had been a part of or included within the public lands of the United States, and to which the United States

never had any lawful right, title or interest in, or claim to, and which the officers of the United States in the Land Office at San Francisco, California, and in the Land Department of the United States, never had or had had any jurisdiction of or control over, under the laws and Constitution of the United States, but which for many years prior to, and at the time of the acquisition of California by the United States, under said treaty, were and ever since have been private lands, and held and owned by the predecessors in interest of said Jacob Gardner, whose title thereto accrued long before the making of said Treaty of Guadalupe Hidalgo, between the United States and the Republic of Mexico, and which right and title was recognized by and vested in them by said treaty, and by them, through mesne conveyances, transmitted to said Jacob Gardner.

IV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that the rights claimed by both parties to the premises in controversy were dependent wholly upon, and were under the Constitution, treaties and laws of the United States, and that under the Constitution, treaties and laws of the United States, the title, ownership and right of possession claimed by the said Wormouth were invalid and wholly void.

V.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that as it appeared in the evidence contained in the record before said Supreme Court, without any material or substantial conflict, that the entire claim of the said plaintiff, Wormouth, to the premises was as a homestead claim under the laws of the United States; at the time the proceeding was instituted he had not acquired any title from the United States to the premises.

VIII.

That said Supreme Court of the State of California erred in

affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of said Superior Court, to-wit:

"1st. That on the first day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises" (describing the premises described in the complaint in said action in said Superior Court), was under the Constitution, treaties and laws of the United States wholly contrary to and unsustained by the evidence in said case appearing in the record on appeal before said Supreme Court.

XXXV.

The Supreme Court of the State of California erred in deciding that the decision of the Land Department was conclusive as to Wormouth's title to the premises in controversy, upon the ground that it amounts to the said appellant, Jacob Gardner, being thereby deprived of his property by the State of California, without due process of law, in deciding that the Land Department, by its decision in said contest before it, between said Throckmorton and said Wormouth, that the decision of said Department adverse to said Throckmorton operated to destroy his right and title to said premises under said treaty.

III—*Question Res Adjudicata.*

XXIII.

That said Supreme Court of the State of California erred in not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was beyond its jurisdiction in that it in effect reviewed and set aside the said decree of said United States District Court of January 14, 1856, so far as the same confirmed the right and title of said Jacob Gardner and his predecessors to said premises.

XXXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same upon the ground that the question of right and title decided by said Superior Court was one which had been finally settled and determined by said decree of said United States District Court, and which said Superior Court was without power, authority or jurisdiction to in any wise determine.

IV—*State Courts Without Jurisdiction.*

XV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, and in not ordering the same dismissed or abated upon the ground that in the record on appeal from said Superior Court before said Supreme Court, it was shown conclusively said Superior Court was without jurisdiction to adjudicate any of the issues involved in said cause of action in that the jurisdiction to determine said controversy lay wholly within the Courts of the United States, under the said Act of Congress of March 3, 1851.

XVII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that said Superior Court was without jurisdiction to determine the subject matter of the controversy involved in said cause of action before it, the same being vested exclusively in the United States District Court for the Northern District of California, by said act of March 3, 1851.

XXVII.

That said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, upon the ground that the said Superior Court, by its said judgment, had

in excess of its authority and jurisdiction decided against and held invalid the right and title of the Reed heirs to the premises in controversy, under the Treaty of Guadalupe Hidalgo, and which was confirmed to them and finally adjudicated valid by the United States District Court, by its said final decree of January 14, 1856, and to which right and title said Jacob Gardner had succeeded, as shown by certain mesne conveyances from said Reed heirs and their successors in interest, mentioned in the pleadings, and proved by the evidence at said trial, without any conflict whatever.

XVIII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the controversy before the Superior Court involved the right, title, ownership and possession of the premises there in controversy, which right, title, ownership and possession being dependent wholly upon a treaty of the United States, to-wit: the Treaty of Guadalupe Hidalgo, was by the Constitution and laws of the United States, and particularly by the Act of Congress of March 3, 1851, hereinbefore referred to, exclusively cognizable and determinable in the District Court of the United States of the Northern District of California, and the Supreme Court of the United States, and in that the question of the right, title, ownership and possession there involved had been finally adjudicated and settled in said District Court by a final decree of said District Court, confirming the right and title of the heirs of Juan Reed to the land in controversy (together with other lands), and the right and title thereto being a right and title under said treaty, was drawn in issue in Superior Court, which Superior Court found erroneously adversely thereto, and basing its judgment upon such finding, erroneously rendered judgment against the said defendant, Jacob Gardner, and which judgment was affirmed by said Supreme Court, notwithstanding that said right and said title under said treaty was there fully presented and argued, and the decision of said Supreme Court of the State of California was thereby against said right and said title, under said treaty claimed by the said defendant, Jacob Gardner, as the successor in interest of the said heirs of Juan Reed, the confirmees under said decree of said District Court, and thereby

denied the said defendant, Jacob Gardner's, right and title under said treaty to said premises.

XXV.

That said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, and in not reversing the same, upon the ground that the title, ownership and possession of the premises there in controversy, and the question of title thereto, had been finally adjudicated in the District Court of the United States for the Northern District of California, in its aforesaid decree of January 14, 1856, and upon the further ground of said Superior Court was without power, authority or jurisdiction to change, alter or review the lawful effect of said decree, and was without jurisdiction to settle any right of the parties thereto, or their successors in interest, including said defendant, Jacob Gardner, finally determined or settled or adjudicated thereby.

XXXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the sole question of title decided by said Superior Court was one wherein the original primary sovereign title of the United States was at issue, i.e., the question as to whether the lands in controversy were ever included with the public land of the United States or not; whether they were under the Treaty of Guadalupe Hidalgo public lands of the United States, or the lands of private owners who possessed them at the time of, and prior to the execution of said Treaty under the laws of the Republic of Mexico; and that the settlement of that question was one particularly under the Act of Congress of March 3, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California," was vested solely in the Courts of the United States, to-wit: The District Court of the Northern District of California, and on appeal therefrom, the Supreme Court of the United States, and because said Superior Court was without jurisdiction to make any determination with which, under the Constitution and laws of the United States, reference to the settlement of that question.

Part Second—EQUITABLE BRANCH.

XXXIII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the following grounds, to-wit:

(a) That the evidence was insufficient to justify the second finding of the Superior Court upon the equitable issues in the case to the effect that one of the questions decided by the United States Commissioner of the General Land Office and by the United States Secretary of the Interior, in the contest of Throckmorton v. Wormouth, mentioned in the 20th paragraph of the cross-complaint in said cause, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed and that there was no evidence to support said finding.

(b) That the evidence was insufficient to justify the third finding of the Superior Court, upon the equitable issues before it, that the officers of the United States Land Department, to-wit: The Register and Receiver, Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact, upon the evidence produced before said Register and Receiver on said contest, was not included in said original grant by the Mexican Government to Juan Reed, and that there was no evidence to support said finding.

(c) That the evidence was insufficient to justify that portion of the fifth finding of the Superior Court, upon the equitable issues before it, in which it is found that the consideration paid by J. Clinton Bolton to the Reed heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, for the United States Register and Receiver, and affirmed by the deed to him in 1865, was not a money consideration and that the only consideration which passed from said Bolton to said grantors was the agreement by said Bolton mentioned in said fifth finding, and there is no evidence to support said finding;

(d) The evidence was insufficient to justify the sixth finding of the Superior Court, upon the equitable issues before it, to the effect that the officers of the United States Land Department, to-wit: The United States Register and Receiver, the Commissoner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence pro-

duced before them in said contest of Throckmorton v. Wormouth, in denying said application of Throckmorton, did not base their decision upon the question of law alone, but did find and decide, as a fact, that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, but on the contrary the evidence showed that said officers of the United States Land Department based their decision in said contest upon the question of law alone, and did not find and decide that the said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, and that there was no evidence to support said finding.

(e) The evidence was insufficient to justify and there was no other evidence to support that portion of seventh finding of the Superior Court, upon the equitable issues before it, wherein it is found that the rancho granted by the Government of California under the Government of Mexico to Juan Reed, did not include within its exterior limits the lands described in the deed from T. B. Deffebach et al. to Julius C. McCeney, of February 14, 1871, or any part thereof except so much as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al., and the evidence is insufficient to justify, and there is no evidence to support that portion of said seventh finding, wherein it is found that the grant mentioned in the first paragraph of said cross-complaint did not include any part of the land in controversy in this action, and that no grant was ever made by the Mexican Government to Juan Reed or his successors in interest included in any part of the land described and granted to the plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

(f) The evidence was insufficient to justify and there was no evidence to support the eighth finding of the Superior Court, upon the equitable issues before it, to the effect that the land described in said deed from T. B. Deffebach et al. to Julius C. McCeney, or any part thereof, except as in the seventh finding of the Court set forth, was not within the exterior boundaries of said Mexican grant.

(g) That the evidence was insufficient to justify and there was no evidence to support that portion of the ninth finding of the Superior Court to the effect that the consideration mentioned in the ninth finding of the Superior Court upon the equitable issues before it, to the effect that the consideration

mentioned in the fifth finding upon said equitable issues, was the only consideration for the deed mentioned in said ninth finding.

(h) That the evidence was insufficient to justify and there was no evidence to support that portion of the tenth finding of the Superior Court in the equitable issues before it, in which it found that neither T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle or H. C. Newhall did, on the first day of February, 1871, or at any other time, own or were entitled to convey to any one any of the land described in the sixteenth paragraph of said cross-complaint, except a small part thereof, which was described in said tenth finding.

(i) That the evidence was insufficient to justify and there was no evidence to support that portion of the eleventh finding of the Superior Court, upon the equitable issues before it, which is to the effect that Julius C. McCeney on the 19th day of January, 1875, or at any other time, was the owner, and was not entitled to convey any of the land mentioned and described in the deed from said McCeney to said Throckmorton, described in said eleventh finding, save and except that portion of said land which lies within the boundary of said Reed patent.

(j) The evidence was insufficient to justify and there was no evidence to support that portion of the twelfth finding of the Superior Court, upon the equitable issues before it, which is to the effect that none of the grantees named in the deed mentioned or referred to in the 18th paragraph of said cross-complaint purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and rights of the plaintiff, as alleged in his complaint in this action, and that neither the said Throckmorton or his executrix ever had any right to use or improve any part of said lot 3 in section 28, or of said lots 2 and 3 in section 29, and that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff; and the evidence is insufficient to justify, and there is no evidence to support that portion of said twelfth finding which is to the effect that said grantees and each of them, and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by the said deeds, or any part or parcel

of said lot 3 in section 28 and said lots 2 and 3 in said section 29, were included within said Mexican grant, and that said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lots 2 and 3 in section 29.

(k) The evidence was insufficient to justify and there was no evidence to support that portion of the thirteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that there is no evidence to show that the evidence introduced in the matter of the application and contest mentioned in the 19th paragraph of said cross-complaint did not show without conflict that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true, but, on the contrary, the evidence did show that all of said facts mentioned were true.

And the evidence is insufficient to show and there is no evidence to show that the evidence introduced in the matter of said application and contest did not establish all of said facts or any material fact in favor of said Throckmorton's right to purchase said land by competent, or any, evidence, and that there was conflict in said evidence and that there was evidence on said contest that contradicted said Throckmorton's evidence, and the evidence alleged in said cross-complaint was not true, but, on the contrary, said evidence did establish all of said facts in favor of Throckmorton's right by competent evidence and without conflict, and there was, in fact, no evidence of said contest which contradicted Throckmorton's evidence, and it fully appeared from the evidence that all the evidence, as alleged in said cross-complaint on said contest, was true;

And the evidence is insufficient to show, and there is no evidence to show that the Register and Receiver of the Land Office at San Francisco did not, nor did either of them, on the 9th day of February, 1866, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict, but, on the contrary, the evidence fully shows that said Register and Receiver did, on the said 9th day of February, 1886, base their and his decision fully and precisely upon the evidence as the same is alleged in said cross-complaint and upon evidence without conflict;

And the evidence is insufficient to show and there is no evidence to show that the Register and Receiver did not, nor did either of them, rest their or his decision upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law, or under the law, entitled to purchase the said land, and that the Commissioner of the General Land Office, upon appeal from the decision of the Register and Receiver, upon the, or upon a proposition of law in deciding that Throckmorton was not entitled to purchase the said land, and that the said Secretary of the Interior did not rest his decision affirming the decision of the Commissioner of the General Land Office upon the, or upon a proposition of law, and that the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of Throckmorton v. Wormouth, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint, but, on the contrary, the evidence showed that each of the said officers of the Land Department, to wit: the Register and Receiver, the Commissioner and the Secretary of the Interior, based his decison and each of said respective decisions upon the proposition of law, to-wit: the proposition that upon all the facts set forth in said cross-complaint, which were duly established before said officers, and each of them, the said Throckmorton was not in law, or under the law, entitled to purchase the said land.

(l) The evidence was insufficient to justify and there was no evidence to support that portion of the fourteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns, and was not entitled to purchase the said land or any part thereof under said act of Congress, and that the Register and Receiver of said Land Office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow plaintiff to make proof and payment for the said land, but, on the contrary, the fact was and the proofs before said officers showed without conflict that said Throckmorton was a bona fide purchaser from Mexican grantees and their assigns, and was entitled to purchase the said land and every part thereof under said act, and the Register and Receiver of said Land Office did, contrary to law, basing

their decision on an erroneous construction of the law applicable to the case before them, allow the plaintiff to make proof and payment for said land, and hold in substance that all of the facts set forth in the cross-complaint herein did not entitle said S. R. Throckmorton to purchase said land.

(m) The evidence was insufficient to justify and there was no evidence to support that portion of the fifteenth finding of the Superior Court upon the equitable issues before it, which is to the effect that said Susanna M. Throckmorton was not the owner of the said land when she executed the said deed, and that she was not entitled to convey the same to said Gardner.

(n) The evidence was insufficient to justify, and there was no evidence to support that portion of the sixteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that Jacob Gardner did not, on the 17th day of July, 1890, or at any other time, enter into the possession thereof, except as an intruder and trespasser.

(o) The evidence was insufficient to justify and there was no evidence to support the seventeenth finding of the Superior Court, upon the equitable issues before it, to the effect that said Jacob Gardner is not, and never was, the owner in equity of said land or any part of the land described in the plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22d paragraph of said cross-complaint, and that said plaintiff does not hold said land, or any part thereof, in trust, or otherwise, or at all, for defendant, Jacob Gardner.

XXXIV.

The said Supreme Court of the State of California erred in that part of its decision contained in his opinion filed in said cause upon appeal, in the following particulars:

(a) In deciding that "the principal contention of the defendants for reversal was in relation to what they called their equitable title."

(b) In deciding that the contest of Throckmorton referred to in said opinion was one entirely within the jurisdiction of the United States Land Department, in that the record on appeal before said Supreme Court showed without conflict that the contest was not within the jurisdiction of said Land De-

partment, in that it involved a judicial question as to the character of the land in controversy, whether, under the treaty of Guadalupe Hidalgo, it became public land of the United States or remained the private holding of private owners.

(c) In deciding that both parties in said contest in said Land Department were endeavoring to get title in which each admitted the land was United States Government land, and was subject to disposition under the laws of the United States, it appearing in said record on appeal without conflict that said proceeding on the part of Throckmorton was not to obtain title to what he admitted to be United States Government land, but was for the sole purpose of obtaining a quitclaim of the Government's interest in said land, and thereby removing a cloud upon his title.

(d) In deciding that the Land Department had exclusive jurisdiction to determine all the facts which arose in said contest.

(e) In deciding that the decision of the Land Department in said contest was a decision upon the issues of fact specified in said opinion, in that the transcript of the proceedings in said Land Department in evidence in said Superior Court, and contained in said record upon appeal, did show conclusively that all the evidence before said Land Department was without any conflict as to any material fact; that there were no issues of fact before the Land Department, and that the only decision of the Land Department was upon the legal effect of the undisputed facts in the record before it.

(f) In deciding that "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the possession of the same, according to the lines of his purchase, were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as belief that the land he purchased was included within the original limits of the Mexican grant, were also facts to be determined by that officer, from all the circumstances under which the purchase was made." That the decision in these particulars is erroneous and contrary to the Constitution and laws of the United States, in that the evidence before said Land Department aforesaid, without any material or substantial conflict whatever, did show that at the time Throckmorton made said application to said Land Department, his right and title to said

premises was one that was valid and well vested, and secured to him under said Treaty of Guadalupe Hidalgo, and which had been finally settled and adjudicated in favor of the right and title he claimed by said District Court in its said decree of Jaauary 14, 1856, and that by reason of the fact that Throckmorton, at the time of said application, had absolute title to said premises, and as a matter of law, under the Constitution and laws of the United States, the question as to whether he purchased the land for a valuable consideration, or that, that after his purchase, he used, improved and continued in the actual possession of the same, or that that of his good faith in making the purchase, or that that of his belief that the land he purchased was included within the original limits of the Mexican grant, could not be raised in said Interior Department, said Interior Department being concluded, as a matter of law, upon all those facts, and that therefore, there being no issues of facts before said Land Department, the Secretary of the Interior could not render a decision upon any of those facts, but could only render a decision upon the law in the case, and that its decision was therefore but a decision upon the law in the case.

(g) In deciding that the decision of the Secretary of the Interior was not an erroneous application of the law, and in deciding that its decision was based upon facts which necessarily defeated the claim of Throckmorton.

(h) In deciding that the decision of the United States Land Department, accordingly as the same in said record and appeal was conclusive in favor of respondent Wormouth's title.

(i) In deciding that the other points in the case were unnecessary to be discussed.

ARGUMENT.

PART I.—LEGAL ISSUES.

PRELIMINARY.

This action was commenced in the Superior Court by Wormouth, the plaintiff, and (until his executor Bonestell was substituted) defendant in error herein, filing an ordinary complaint in ejectment (Tr., pp. 1-4). To this Jacob and Peter Gardner, the defendants and the plaintiffs in error herein, filed an answer denying all the allegations of the complaint and asserting an absolute title in Jacob Gardner to the land

in controversy; later the Gardners obtained from the Superior Court an order (Tr., p. 9) allowing them to amend and to supplement their answer, which they accordingly did (Tr., pp. 10-17) and in which they set up a complete title to the land in controversy under the Treaty of Guadalupe Hidalgo, the Constitution and laws of the United States generally, the Act of Congress of March 3d, 1851, "*to settle land titles in California*" particularly, and specifically under a final decree of the United States District Court confirming the title of Gardner's predecessors, the Reed heirs, to the premises in controversy under that act of Congress as a specific right and title under the treaty, they being "Mexicans" in possession and entitled to remain and retain the property they then possessed.

Treaty Guadalupe Hidalgo, Art. VIII.

The complaint sets up:

> "1. That on the first day of February, A. D. 1891, the "plaintiff was, and for a long time prior thereto had "been the owner of, in the possession of, and entitled to "the possession of, and from thence hitherto has been "the owner of and entitled to the possession of that cer- "tain piece or parcel of land, situate, lying and being "in the County of Marin, State of California, and "bounded and described as follows, to wit": (here follows description describing the land, Tr., p. 1—see also map Tr., p. 112C).

The complaint further alleges:

> "11. That on, to wit, the 1st day of February, A. D. "1891, and while this plaintiff was so possessed and "entitled to the possession of said land and premises, "the said defendants, without right or title, wrongfully "and unlawfully entered into and upon the same, and "ousted and ejected the plaintiff from the same (ex- "cept that portion thereof bounded and described as "follows, to wit": (the excepted portion being that contained within the dotted lines on map 120 C).

The third and last paragraph was an allegation of damage, and the prayer for relief asked for a restitution of the premises with damages.

The complaint set out a second cause of action for the purpose of obtaining an injunction, reiterating the above allegations and setting out certain grounds for equitable relief by way of injunction; as the relief sought was purely interlocu-

tory, the second cause of action is wholly immaterial in this Court.

The defendants, Peter Gardner and Jacob Gardner, filed in the Superior Court an answer to said complaint (Tr., p. 4), sets forth that they

> "1st. Deny that on the 1st day of February, 1891, or "any other time, the plaintiff was or for a long time or "any time prior thereto, had been the owner of, or in "the possession of, or entitled to the possession of, or "from thence hitherto, or from any period of time or "ever, has been the owner of or entitled to the possession of the land described in said complaint or any part "thereof, or any of the tenements, hereditaments, or "appurtenances thereunto belonging or in anywise appertaining, except that the plaintiff was on said day, "and since that time has been in the possession of, so "much of the said land described in said complaint as "is described as follows": (here follows description in Transcript p. 5).
>
> "2nd. And defendants deny that on the 1st day of "February, 1891, or while the plaintiff was possessed "or entitled to the possession of said land or premises "or any part thereof, except the said portion hereinbefore described, the defendants without right or title, "or wrongfully, or unlawfully, or otherwise, or at all, "entered into or upon the said land, or ousted or ejected "the plaintiff from the same, or any part thereof, or "that they ever entered at all into or upon any part of "said excepted parcels of said land, or that said defendants or either of them, have ever since wrongfully, or unlawfully, withheld the possession of any "of said land from the plaintiff, or that the defendants "ever ousted or ejected the plaintiff from any part of "said excepted parcels of said land, or that defendants "or either of them, have ever wrongfully, or unlawfully, or otherwise or at all, withheld or still or now "withhold the possession of any part of said excepted "parcels of land hereinbefore described from the plaintiff, or that the plaintiff has ever been damaged by "any withholding by defendants of said land from him "in the sum of $500.00 or any other sum of money, but, "on the contrary, these defendants aver that the defendant, Jacob Gardner, and his predecessors in

"estate, were at the date of the commencement of this
"action, and for more than forty years next prior
"thereto, had been and still are the owners of, and in
"the open, actual and adverse possession of all of the
"lands described in said complaint, except so much
"thereof as is hereinbefore described, and that the de-
"fendant, Peter Gardner, has for more than two years
"last been upon the said premises under and in sub-
"ordination to the said Jacob Gardner and his title,"
and then denied the damages.

They also denied the allegations of the second count, while in their supplemental answer the defendants supplemented this allegation by setting up their complete title in detail and the grant to Reed in 1834 by the Mexican Government that the land granted included the premises in controversy (which were correctly described in the deed from Deffebach to McCeney—see Tr., pp. 12-13). The descent of the title from Reed to his heirs in 1843; that the grant was confirmed by the Board of Land Commissioners; whose confirmation was approved by the District Court January 14th, 1856, that made a decree confirming the grant; the making of the Mathewson survey, that excluded the land in controversy; that the patent issued to the Reeds excluded the land in controversy; and then setting up the title to the Reeds through a number of mesne conveyances to Gardner. The chain of title shows that the Reeds parted title to the property many years before they accepted the patent. The supplemental answer also sets up the Wormouth patent and its illegality and that it was in equity held in trust for Gardner.

These pleadings cover the entire ground presented and simply left one question to the Superior Court to decide, "Who was the owner of the premises in controversy, Wormouth or Gardner?" i. e., which of the two titles was the valid one.

Upon the trial of these issues Wormouth testified as to his settlement upon the land, and produced his receipts from the Land Office. By stipulation between the parties (Tr., p. 146) all of the deeds constituting Gardner's chain of title, the grant of juridical possession (Tr., pp. 145-6), the transcript of proceedings in the Land Department (Tr., pp. 46-118), the diseno (Spanish map—Tr., p. 46A), Reed patent (Tr., p. 118), and all the other maps and documents were admitted in evidence. The transcript of proceedings in the Land Department contained a large amount of testimony, maps, deeds, the decree

of the United States District Court (Tr., pp. 91-91), decision of the Board of Land Commissioners (Tr., pp. 88-89), the proceedings in the case of Bolton vs. Van Rynegom (Tr., pp. 102-109), the expediente (Tr., pp. 84-87), the expediente is all in the transcript in the Land Department except the *grant of juridical possession* and *the diseno*, the grant being on Tr., p. 145, and the diseno Tr., p. 46A. On defendants' behalf, defendants both testified, Peter Gardner (Tr., p. 147), and Jacob Gardner (Tr., p. 151).

There were a number of witnesses who testified as to the rental value and damages for detention; the only issues that were submitted to the jury, but those matters are in no wise material here and by stipulation have been omitted from the printed transcript.

It will be seen from the foregoing that the ejectment branch of this case comprising the legal issues was practically tried on an agreed statement of facts and that it left for the decision of the Court, which by stipulation was to decide it (Tr., p. 137 and p. 155-6), simply the question as to which title was valid, the Mexican title of Gardner or the American title of Wormouth, and *the determination of this question rested entirely upon the proposition as to whether or not the land in controversy was public or private land under the treaty.* If it were private land, then Wormouth practically conceded Gardner's title. If on the other hand it were public land under the treaty, Gardner only conceded Wormouth title in case Wormouth's original entry was valid, which the evidence shows it was not, for, as will be shown hereafter, the Gardners being in possession by themselves and their predecessors in estate when the entry was made and ever afterwards, the entry itself was absolutely void.

This shows the condition of the ejectment or legal branch of the case under which we raise four of the six questions we above enumerated and which we will entitle:

1—Gardner's absolute title.
2—Wormouth's want of title.
3—That the question is *res adjudicata*.
4—The State Courts without jurisdiction.

I. GARDNER'S ABSOLUTE TITLE.

First—*That Jacob Gardner had absolute title and right to the land in question under the treaty of Guadalupe Hidalgo, the act of*

March 3d, 1851, and the final decree of the District Court of January 14th, 1856.

The treaty is not mentioned in the pleadings in terms, but the allegations show beyond a doubt the complete title under the treaty, which need not be specially pleaded:

> "to raise the Federal question it is only necessary to "show the complete title under the treaty. The treaty "need not be specially pleaded."
>
> Hickie *v.* Starke, Peters 97.

It was necessary to decide this treaty right to render judgment that gives jurisdiction (the treaty being the same as the statute in this respect).

> California Bank *v.* Kennedy, 167 U. S. 365.

The question must appear to have reason by clear and necessary.

> Ocean Ins. Co. *v.* Polleys, 13 Peters 137.

And to have above necessarily involved.

> Armstrong *v.* Treasurer, 16 Peters 261.

Prior to the grant of juridical possession, it is admitted that the title of the entire Reed Ranch, including the premises in controversy, was in the Mexican Government; that Reed acquired a valid title from that Government; that the premises were actually delivered to him by the grant of juridical possession.

This delivery of juridical possession was the physical delivery of the land, very similar to the common law livery of seisen, as Justice Field points out in the number of cases, notably those of

> Graham *v.* United States.
>
> Pico *v.* United States.
>
> Van Rynegom *v.* Bolton, cited below.

The Mexican Alcalde in the presence of witnesses first surveyed the land after the Mexican custom, and then with the grantee went along the boundaries from landmark to landmark and placed grantee in physical possession of the land. This Court has repeatedly held that the grant of juridical possession in all these cases definitely fixes the land conveyed, and that it is binding upon the Government of the United States, not only by treaty but also by the law of nations, and upon all its officials, who are bound to follow the same lines it prescribes and whose acts are void where they fail to substantially do so in all material respects.

The evidence shows without conflict that the land in con-

troversy is an actual part of that of which juridical possession was delivered in 1835 to Juan Reed; *a fact that stands out in bold relief in every branch of this case and determines every question involved in Gardner's favor.* The grant of juridical possession invested Reed and his successors in the estate with complete title and possession of all of the entire Reed Ranch, which demarkation included the land in controversy. The act of Congress of March 3d, 1851, is entitled "An act to settle land titles in California" (9 Stat. 631) was passed to ascertain and settle these titles as the necessary means of determining the extent of the public domain in California.

It is perfectly plain that the tribunals created by that act, in the first instance the Board of Land Commissioners and the District Court in the second instance, were bound in the case of every valid grant to confirm it according to the grant of juridical possession where the delivery was actually made, as in this case. They could neither enlarge nor reduce it and *in such cases the grant was conclusively held to be one of boundaries,* and it was only in cases of uncertainty as to boundaries or in the absence of a specific grant of juridical possession or where the grant was unmistakably one of specific quantity that this rule was departed from by the Federal Courts. They held over and over again and this Court has said:

> "By this proceeding—called in the language of the "county the delivery of juridical possession—the land "granted was separated from the public domain ,and "what was previously a grant of quantity became a "grant of a specific tract.
>
> "The record of a proceeding of this nature must "necessarily control the action of the officers of the "United States in surveying land claimed under a con- "firmed Mexican grant.
>
> "Survey did not corform to decree, was set aside by "District Court and judgment affirmed."
>
> Graham *v.* United States, 4 Wall. 261.
>
> "Were there any doubt of the intention of the Gov- "ernor to cede all the land contained within the bound- "aries designated by him, it would be removed by the "juridical possession delivered to the grantees. This "proceeding involved an ascertainment and settlement "of the boundaries of the lands granted by the appro-

"priate officers of the Government, specially desig-
"nated for that purpose, and has all the force and effi-
"cacy of a judicial determination. *It bound the former*
"*Government and is equally binding upon the officers of our*
"*Government.*"

Pico *v.* United States, 5 Wall. 539.

The Court also in the case of Van Rynegom *vs.* Bolton, where it referred to this identical property, the Reed Ranch, in its decision in the ejectment case, brought by Gardner's predecessor, Bolton, to eject Wormouth and others when they assumed to "jump" the land after the Mathewson survey, and then the Court said:

"Ordinarily the boundaries thus established would
"be accepted as conclusive by our Government. Unless
"there is something in the decree of confirmation other-
"wise limiting the extent or the form of the tract, they
"should control the officers of the United States in
"making their surveys. It was so held by this Court in
"Graham *v.* U. S., 4 Wall. 259, and in Pico *v.* U. S.,
"5 *id.* 536.

"In the case at bar, the Surveyor-General for Cali-
"fornia disregarded the boundaries established upon
"the juridical possession delivered to the grantee. He
"proceeded upon the conclusion that the confirmees
"were restricted by the decree to one square league, to
"be measured out of the tract within those boundaries,
"which exceeded that amount by about fifteen hundred
"acres. * * * * * * * * *
"Their possession was therefore that of simple in-
"truders and trespassers without color of right."

Van Rynegom *v.* Bolton, 95 U. S. 33.

This action as appears in the transcript (pages 102 to 109) was fully tried in the Circuit Court *and the defendants actually ejected.* In these proceedings Wormouth's surname was inadvertently given as "Edward" in place of "Ebenezer." Wormouth himself says (Tr., p. 76), "I was one of the defendants in this suit"; the United States Marshal (Tr., p. 108), certifies that he ejected him. When that case went to the Supreme

Court no bill of exceptions was filed, and therefore the grant of juridical possession was not actually before the Supreme Court, but the Court has shown that if the grant was specific it should control, and it affirmed the judgment of the Circuit Court which did so hold.

The decree of the United States District Court confirms the grant *according to the grant of juridical possession*, and the possession and title of the Reeds were in nowise disputed until in 1858, when the Land Department simply construed *the effect of the decree*. The Land Department contended that the grant was one of quantity and not of boundaries, and upon that theory proceeded to reduce the grant by lopping off 1,500 acres, which included this land.

Van Reynegom *v.* Bolton, 95 U. S. 33.

This was their only contention against the Reed claim to that part of the grant which they were in possession of that included the land in dispute.

For fourteen years this matter was hung up in the Land Department, and it finally rendered the decision through Secretary Delano rejecting the Mathewson survey and ordering the survey in grants with the grant of juridical possession. In his decision Secretary Delano says:

> "The Assistant Attorney-General, in his opinion, a "copy herewith, discusses at length the questions of "law and fact involved in this case, and I fully concur "in the conclusion at which he arrives; that that de- "cision of the Commissioner be reversed, and that the "Surveyor-General be directed to make another survey, "including the land within the boundaries, particu- "larly described in the decree of the District Court, by "reference to the confirmation of the Board of Land "Commissioners, *being the land covered by the juridical "possession of the original claimant Reed.* I am of the "opinion that the decree of the District Court con- "firmed to the claimants all of the land lying within "the boundaries shown by the map attached to the ex- "pediente." (Decision rejecting Mathewson survey). Decided January 6th, 1872.

The contention that the grant was one of specific quantity

was then finally settled and definitely abandoned by the Department and the decision became *res adjudicata* in the Department.

Then arose another peculiar condition of things as disclosed by the record in this case and the published decisions of the Land Department. There seems to have been a long-drawn-out contest over the re-survey of this property, which was left to two surveyors by the name of Ransom & Allardt. Allardt's testimony, which appears in the transcript of proceedings in the Land Department (pp. 66 to 72), shows that no survey was actually made. He says (Tr., p. 68): "I am not aware that Leander Ransom made any survey in the field pertaining or relating to the western boundary of the Rancho Corte Madera del Presidio. I think not—I am very positive on that point, that he made no survey in the field, because I furnished all the field notes that he returned. The Ransom survey was a compilation of State and private survey. The portion of that survey which was made by the State was all of the meanders of the bay and of the marshes. Leander Ransom returned two sets of field notes of the Rancho Corte Madera del Presidio, one of which included the salt marshes and the other excluded them." (Allardt (Tr., p. 71), referring to the western boundary of the grant, says: "I think in the field notes of the juridical survey under the Mexican government it affixes the Arroyo Corte Madera del Presidio as the western boundary."

"The juridical measurement commenced at the point on said Arroyo and rose from that point northerly, which described the Arroyo as the boundary of said grant and identifies. I testify from recollection, and feel pretty positive on that point." Throckmorton's testimony, also, in the transcript of the Land Department (pp. 54 to 63), makes this more clear and particularly (p. 61, at folio 72, down to folio 73, on p. 62). This evidence, which by stipulation was admitted in the ejectment part of the proceeding, is wholly uncontradicted by any testimony in the case and conforms exactly to the statement in the grant of juridical possession. In the grant of juridical possession it says:

> "They commenced said measurements from the solar
> "(house-lot) which faces west and stands at the slope
> "and foot of the hills which lie in that direction, and
> "on the edge of a forest of redwoods called 'Corte Ma-

"dera del Presidio,'; they commenced their measure-
"ments, and, *going from south to north*, they first meas-
"ured to the Arroyo called 'Holon,' where is another
"forest of redwoods called 'Corte de Madera del San
"Pablo,' 90 cordeles of 50 varas."

By reference to the colored map it will be seen that this exactly conforms to the blue line marked "A" to "A2."

The patent line, the yellow line on the map, begins a mile west of the solar, as the field notes show, runs in a different direction to a point a mile and a half beyond the Arroyo Holon across an impassable marsh to a slough. It leaves out the very thing which gave the ranch its name, to-wit: the forest of redwoods, and includes a large quantity of marsh land and the large Peninsula Island; the survey includes also a part of the land excluded by Mathewson ,and grants close on to 8,000 acres within lines of which the yellow line is the western boundary.

There is not a bit of evidence in the case in support of the yellow line which constitutes the western boundary under the patent, and we simply show by reference to the facts we have just stated enough to demonstrate how completely it violates the boundaries fixed in the grant of juridical possession, which are the boundaries as thus found in the decree of the United States District Court. Marsh lands were never granted by the Mexican government, a fact that stands as part of the judicial history of this country. In short, the decree of the District Court by making the grant of juridical possession a part of it granted the exact land that the Reeds possessed, namely, that within the blue lines "C" to "A," "A" to "A2" and "A2" to "D," and the high water lines the rest of the way.

The Land Department, on the other hand, without the slightest authority whatever, either in law or by the reason of any fact in the case, granted an entirely different body of land to the Reeds by this patent; they having years before receiving the patent parted with title to the land in controversy.

The singular part of the transaction is emphasized by the decisions in the Land Department, following Secretary Delano's, of two of the Secretaries, whose decisions changed the effect of Delano's as to following the grant lines, and Secretary Teller following then reversed them both and held that the Delano decision was *res adjudicata* in the Land Office and must be followed. When he went out of office his successor

accepted the compiled map of Ransom & Allardt and issued the patent upon it. It is clear, therefore, that the Land Department never followed the requirements of the decree of the United States District Court and wholly failed to make the proper survey. This makes their entire survey and the patent issued upon it absolutely void, so far as we are concerned, as we are in no wise estopped by the acceptance of the patent by the Reeds, they having parted with all title to our land twenty years before they accepted the patent. Upon this question the Court has said:

"It is nevertheless a clear distinction established by "law, and it has been often asserted in this Court, that "even a patent from the Government of the United "States, issued with all the forms of law, may be shown "to be void by extrinsic evidence, if it be shown such "evidence by its nature is capable of showing a want "of authority for its issue."

Doolan *v.* Carr, 125 U. S. 638.

"The duty of the Surveyor-General, under all these "acts, is to survey and locate the confirmed tract, in "conformity with the decree. It is the only guide "which is furnished to him."

Fossat Case, 2 Wall. 714.

"The material question is, whether the survey ap- "proved conforms to the decree of confirmation. There "must exist a reasonable conformity between them, or "the survey can not be sustained." * * *

* * * * * * * * * * * *

"The answer to all efforts of this kind is that the de- "cree is a finality, not only on the question of title, but "as to the boundaries which it specifies. * * "the question of its correctness is forever closed."

United States *v.* Halleck, 1 Wall. 453.

" * * The issuing of a patent is a minis- "terial act, which must be performed according to law. "A patent is utterly void and inoperative which is is- "sued for land that had been previously patented to "another individual. The fee having been vested in the

"patentee by the first patent, the record (second) could "convey no right. * * The patent of the de- "fendant having been for land reserved for such appro- "priations, is void."

Stoddard *v.* Chambers, 2 How. 318.

"It has been repeatedly held by this Court that a "patent is void which attempts to convey lands that "have been 'previously granted, reserved from sale, or "appropriated. It would be a dangerous doctrine' "(say the Court in New Orleans *v.* United States) 'to "consider the issuing of a grant as conclusive evidence "of right in the power which issued it. On its face it is "conclusive and can not be controverted; but if the "thing granted was not in the grantor no right passes "to the grantee. A grant has been frequently issued "by the United States for land which had been pre- "viously granted, and the second grant has been held "to be inoperative.'"

Best *v.* Polk, 18 Wall. 117.

These last two cases in particular are with us because they simply held that the action of the Land Department, being in excess of its authority, raises no presumption and is conclusive on no one. The authority of the Land Department was limited to make the survey and grant the patent that followed the decree of the District Court and the grant of juridical possession and anything it did decide of that was void.

Graham *v.* United States, supra.
Pico *v.* United States, supra.
Van Rynegom *v.* Bolton, supra.

In these cases the United States had no title whatever to the land in question, and having none the Land Department had nothing that would legally grant or encumber it, and upon this point this Court says:

"The remaining exceptions * * * pre- "sent one general question of great importance. " * * * It is this: Is it, in any, and if in

"any, in what cases, allowable, in an ejectment, to im-
"peach a grant from the State, for causes anterior to
"its being issued? * * * (p. 99). But there
"are cases in which a grant is absolutely void; as where
"the State has no title to the thing granted, or where
"the officer had no authority to issue the grant. In
"such cases, the validity of the grant is necessarily ex-
"aminable at law."

Polks Lessee *v.* Wendell, 9 Cranch 97-99.

It will be seen from an examination of the record that the only thing that is urged against the title of Gardner is in the action of the Land Department in the different particulars specified, and the whole case of our opponent is based upon the proposition that the Land Department having decided this matter against us we are concluded by its decision.

While all the althorities in principle hold that the Land Department has no power to decide questions of title between litigants *who claim under* on the one hand and those *who claim against* the United States on the other.

We will endeavor clearly to define the distinction between the judicial acts of the Land Department and those exercised by the Courts. Judicial powers may be said to be of two kinds, general and incidental.

General judicial powers are those exercised by a Court of Justice in a determination of a definite controversy as to fact, or upon the law, or upon both, and wherein the ultimate object to be attained and the final act in the proceedings is in itself an adjudication.

Incidental judicial powers are those exercised by the legislative or executive departments of the Government as conditions precedent to the exercise of a legislative or executive function, as the case may be, and wherein the ultimate result is in itself either a legislative or an executive act.

This is the rule that has been followed by this Court in the Minnesota and Nebraska railroad rate cases, where the Court held that in fixing railroad rates the Railroad Commissioners must first judicially establish the essential basis as a condition precedent to the performance of the purely legislative act of determining the amount of the rate to be fixed.

Chicago, etc., R. R. Co. *v.* Minnesota, 134 U. S., 114.
Smyth *v.* Ames, 169 U. S., 466.

The Land Department, being a part of the executive branch of the Government, acts judicially only for the purpose of establishing judicially a condition precedent, in the ascertainment of a state of fact, which is to constitute the basis of the performance of its purely executive act of disposing of public land.

This disposition is by means of a Federal patent. The conclusiveness of the patent depends wholly upon its character. If it is an actual grant of a valid title of the United States, it is conclusive in its recitals; if, on the other hand, it operates merely as a quit-claim on the part of the United States, it is conclusive only so far as a quit-claim deed is ordinarily conclusive upon a private person who executes a quit-claim deed.

In carrying the treaty into effect Congress delegated to the Land Department the power to issue a patent, and that patent is in the nature of a quit-claim from the Government, and has been repeatedly so held.

> "In the first place, the patent is a deed of the United "States. As a deed, its operation is that of a quit- "claim, or rather of a conveyance *of such interest as the "United States possessed in the land*, and it takes effect "by relation at the time when proceedings were insti- "tuted by the filing of the petition before the Board of "Land Commissioners.
>
> "In the second place, the patent is a record of the "action of the Government upon the title of the claim- "ant as it existed upon the acquisition of the country. "Such acquisition did not affect the rights of the in- "habitants to their property. They retained all such "rights, and were entitled by the law of nations to pro- "tection in them, to the same extent as under the for- "mer government. The treaty of cession also stipu- "lated for such protection."

Beard *v.* Federy, 3 Wall., 491.

> "Counsel for the plaintiffs has argued that a patent "from the United States is final and conclusive on "everybody, and that the title which it confers cannot "be disputed in a Court of law.
>
> "No doubt, where the patent is for land to which the "Government had an undisputed title, the proposition

"is generally, if not always, true. But the United "States, in dealing with parties claiming under Mexi- "can grants, lands within the territory ceded by the "treaty with Mexico, never made pretense that it was "the owner of them. When, therefore, guided by the "action of the tribunals established to pass upon the "validity of these alleged grants, the Government "issued a quit-claim—an admission that the rightful "ownership had never been in the United States, but "had passed at the time of the cession to the claimant "or to those under whom he claimed. This principle "has been more than once clearly announced in this "Court. The leading cases are Beard *v.* Federy, 3 "Wall., 478; Henshaw *v.* Bissell, 18 id., 255; Miller *v.* "Dale, 92 M. S., 473."

Adams *v.* Norris, 103 U. S., 593.

It has also been held that if the Land Department failed in the first instance to quit-claim as much land as it should have quit-claimed by the patent, that it had power to grant further patents of that character until the rights of the private owner had been complied with.

Adams *v.* Norris, supra.

IN BRIEF, UPON EVIDENCE WHOLLY WITHOUT LEGAL OR MATERIAL CONFLICT, THE LAND IN DISPUTE WAS AN INTEGRAL PART OF THE GRANT TO AND JURIDICAL POSSESSION OF REED LONG BEFORE THE CONQUEST AND TREATY, AND THIS, COUPLED WITH THE FACT THAT GARDNER IS THE UNQUESTIONED SUCCESSOR IN ESTATE TO REED, AND THAT THE LEGAL POSSESSION OF THE LAND HAS BEEN CONTINUOUS IN REED AND HIS SUCCESSORS DOWN TO AND INCLUDING GARDNER, ESTABLISHES A TITLE IN GARDNER, OF WHICH, WE FEEL JUSTIFIED IN EXPRESSING THE OPINION THAT NO POWER ON EARTH CAN LEGALLY DIVEST HIM OF IT.

II.—WORMOUTH'S WANT OF TITLE.

The part of the first finding:

> "That on the first day of February, A. D. 1891, "Ebenezer Wormouth was and for a long time prior "thereto had been the owner of," etc.,

said premises, is not only unsustained by the evidence but positively against it.

Wormouth himself admits enough to substantiate our statement.

The evidence which plaintiff claims sustains it begins with his homestead entry made on May 20th, 1881 (Tr., p. 138), includes simply his own testimony (Tr., pp. 138-144), and the steps required to be taken to perfect a title to public lands. This evidence is wholly insufficient to sustain the above-mentioned finding.

To begin with, plaintiff frankly admits that he never had or was in possession of the whole of the forty-six acres in issue, in fact but a few acres of it. Says: "Have been in possession of part of that land" (p. 139). "I didn't know whether it would be United States land or anything else" (Tr., p. 139). See map plaintiff's exhibit, which shows portion plaintiff admits he never possessed. "I went there in 1859, the house that I went and lived in was on land that is patented to Reed heirs" (Tr., p. 140). "I lived on the grant land as patented until 1861-2." Says he built a house west of grant land "after filing a homestead" (Tr., pp. 141-142). "In 1881, around there.." "I never had possession of this land—the 33 acres" (Tr., p. 142). "Mr. Throckmorton had possession of it." "I don't know how many years." "After his death Miss Throckmorton held possession of it." "When he went to fence it I informed him I claimed that land." Wormouth's notice to Throckmorton in 1872 (see Tr., p. 75) shows from the above testimony that from 1872 at least until this action began, Jacob Gardner and his predecessors were in actual and exclusive possession of nearly all the land in dispute. There is no conflict on this point at all.

The ownership of public lands remains in the Government and subject to the control of the Interior Department until the patent issues.

> Case of Filkins *v.* U. S. L. Dec., p. 49.
> Case of Hall *v.* U. S. L. Dec., p. 174.

The homestead and pre-emption entry of Wormouth was absolutely void.

He must be first in actual and exclusive possession of the land.

If another be in ahead of him under color of right, he cannot lawfully enter the land, and if he is permitted to do so the entry is void.

Atherton *v.* Fowler, 96 U. S., 513.
Hosmer *v.* Wallace, 97 U. S., 575.
Quimby *v.* Conlan, 104 U. S., 430.

The homestead and pre-emption entries of Wormouth were absolutely void. An applicant for Government land must be in actual and exclusive possession of the land. If another is ahead of him under color of right, the applicant cannot lawfully enter the land, and, if permitted to do so, the entry and all subsequent proceedings based upon it are void, as are the acts of the land officers predicated thereon.

Atherton *v.* Fowler, supra.
Hosmer *v.* Wallace, supra.

And upon this head Mr. Justice Field, in speaking for this Court, says:

> "A settlement cannot be made upon public land al-
> "ready occupied; as against existing occupants, the
> "settlement of another is ineffectual to establish a pre-
> "sumptive right. Such is the purport of our decisions
> "in Atherton *v.* Fowler, 96 U. S., 513, and Hosmer *v.*
> "Wallace, 96 U. S., 575."

In other words, the title of the Government must be valid before the Land Department has power to dispose of it. The Atherton case is very clear upon this point.

> "But if these officers (Land Department) acted with-
> "out authority; if the land which they purported to
> "convey had never been within their control or had
> "been withdrawn from that control at the time that
> "they undertook to exercise such authority. Then

"their act was void for want of power in them to act "on the subject matter of the patent not merely void- "able."

Doolan *v.* Carr, 125 U. S., 638.

That the patent is nowise conclusive upon the Courts where a want of authority to act exists, is equally true.

"It, however, appears very clearly that the contro- "versy turns upon the validity of the patent from the "United States, under which plaintiff claims title, and "which was denied by the defendants. The Circuit "Court for the District of California, therefore, had "jurisdiction of the case, as one arising under the Con- "stitution and laws of the United States."

Doolan *v.* Carr, supra.

This case fully supports our contention that Wormouth's patent is void for want of authority on the part of the Land Department to issue the patent, and that such want of authority may be shown by extrinsic evidence.

It will be seen that even if Gardner's title was defective Wormouth could not recover even costs against Gardner, for, under the laws of the United States, his title was too defective to be a muniment of title upon which any Court could base a judgment in his favor.

III.—THAT THIS QUESTION IS RES JUDICATA.

So far as respondent is concerned, the decree of the United States District Court is *res judicata* and in bar of respondent's claim to the land in controversy.

To sustain this objection it must appear that that decree is:

1. A final judgment.
2. Upon the merits.
3. Between the same parties.
4. For the same cause of action.
5. Rendered by a legally constituted tribunal.
6. By a tribunal having jurisdiction:
   (a) Of the cause;
   (b) Of the person.

Hermann on Estoppel and Res Judicata, Sec. 64.
Boswell *v.* Otis, 9 How., 348.
Durant *v.* Oindroth, 97 N. Y., 133.
Bank *v.* Peabody, 55 Vt., 492-45; Am. R., 632.

There is no question about the finality of the judgment or upon the proposition that the judgment was upon the merits.

The designation "between the same parties" legally includes all their heirs and assigns—all their successors in interest who claim under them. Gardner stands in the shoes of the Reed heirs, while Wormouth stood in those of the United States; therefore, the action is legally between the same parties, being between their privies.

The cause of action is in principle identically the same. The matter beforethe District Court was a question as to whether or not the "Reed Ranch" and every part of it was or was not a part of the public domain; therefore a part of the same cause of action, requiring the same determination, is legally "the same cause of action." The legality of the tribunal and its having jurisdiction are beyond any question whatever.

Therefore the subject matter of the controversy originally in the District Court was the same controversy that was sought to be determined in the Superior Court, and was therefore *res adjudicata*. The only difference is that the Superior Court was without jurisdiction of the subject matter of the action, as will hereafter be shown.

IV.—THE STATE COURTS WITHOUT JURISDICTION.

The three preceding questions comprise the legal issues involved in the original case—the ejectment suit—and are covered by the issues framed by the complaint of Wormouth, on the one hand, and the answer and supplemental answer of the Gardners, on the other. Another question arises that was argued extensively in the State Supreme Court, and that is the important question of jurisdiction.

Had the State Courts of California the power to determine the issues presented to them in the ejectment end of this controversy? Upon the original pleadings these Courts had apparent jurisdiction, and even upon the supplemental answer being filed it was not made clear that they had not, because issues of fact might have arisen that would be covered by pleadings of that

character, but when the evidence was all in and the case submitted in the Superior Court, it became perfectly apparent that there was only one question before that Court in the ejectment part of the proceeding, and that was, *as to whether or not the land in controversy was, under the Treaty of Guadalupe Hidalgo, public or private land.*

The title shown by Gardner proceeded entirely upon the theory thaf it was private land, and if it was private land under the treaty then there is no doubt whatever but that Gardner's title was complete and absolute.

Wormouth's title was based wholly upon the theory that under the treaty it was public land, and could only be maintained upon that theory; therefore, in determining which of these two titles should prevail, the Court was necessarily called upon to say whether or not the land was public or private land in the treaty.

The Superior Court was absolutely without jurisdiction for two very important reasons:

First—Because that question had been finally adjudicated by the District Court in 1856 by a decree which became final, and that the Superior Court had no power to do otherwise than to give effect.

Secondly—Because by virtue of the Act of Congress of 1851 the power to make that determination was vested exclusively in the United States Courts.

It will be thus seen that as the case was finally presented to the Superior Court that Court was without jurisdiction to determine it.

The jurisdiction of a Court or the want of it is not necessarily to be determined by the pleadings; when apparent upon the pleadings themselves the absence of jurisdiction may be said to be patent, but when it requires the proof of all the facts in the case or of some of them upon the trial, it may be designated latent.

The latent want of jurisdiction in this case developed upon the trial, and as the record discloses, is more than clear.

The testimony in behalf of the Gardners was simply the proof of their title and possession under the Mexican grant, and that the land in question was a part of the land actually delivered to Juan Reed. Wormouth did not attempt to dispute any fact that the Gardners proved, and, on the other hand, he contented himself by proving his title from the Government of the United States, which left, as stated, simply the

conflict of two titles, to be determined by the one primal question: *Was the land public or private land under the treaty?*

The equitable issues which were framed by the cross-complaint of Jacob Gardner and Wormouth's answer thereto stand independent of the legal issues, and were within the jurisdiction of the Superior Court to determine.

A question of jurisdiction arises either *before the Court acts*, and is raised to prevent the doing of something it has no power to do, or is raised *after the Court has acted*, and has actually exceeded its authority. In the former case we are to consider just what is patent upon the pleadings, but in the latter we must ascertain from the whole record what its act was.

In looking at this record under this head we must first find out *what the Court did*. What issues it acted upon in order to render judgment.

Looking, therefore, at the record, we find it did just one thing in the ejectment branch of the case; it tried and rendered its decision upon but one essential question; *it decided, in effect, that the land in dispute under the treaty was public, and not private land by the grant of juridical possession*, the official act of delivery *the livery of seisen*.

The Act of March 3, 1851, is entitled "An Act to ascertain and *settle* land titles in California."

Its one purpose was to provide a means of having a judicial settlement of that question in every case by a final decree binding upon every Court or other authority in the land.

Such a decree was rendered in this case by the District Court in 1856, and no Court of the State of California has jurisdiction to anywise alter or review the effect of that decree, or to do otherwise than give it full effect. Were the decree imperfect or ambiguous in any particular, it must be corrected in the District Court by a bill of revivor or some other appropriate proceeding, or, in the absence of a remedy, then by an appropriate proceeding in the Circuit Court; but never, under any circumstances, without express authority from Congress has a State Court any such power.

It is true the action of ejectment under the broad averments of the pleadings might have been tried upon many other issues, but the case was tried upon one main issue, upon which rests its judgment—its final *act*; the only *effect* of the judgment was to make the land public land under the treaty—*a power that did not exist in the Superior Court.*

The proposition that the *effect of the act* of a Court determines, after judgment, the question of jurisdiction, is in principle upon all fours with the rule so clearly laid down by this Court in delineating the extent of its own jurisdiction over decisions of State Courts, particularly with reference to whether or not the Federal question was raised in the State Courts. This Court has uniformly held that *it is the act and not the word of the State Court* that will determine; it is the effect of its decree and not the opinion it expresses that settles the matter.

> "If the Federal question is presented by the record,
> "and its decesion is necessary to the determination of
> "the case, a judgment which rejects the claim, but
> "avoids all reference to it, is as much against the right,
> "within the meaning of the section, as if it had been
> "specially referred to and the right directly refused."
>
> Chapman *v.* Goodnow, 123 U. S., 540.

This is the equivalent of saying it is the act and not the word of the Court that counts. So has the same principle been enunciated in other cases, notably:

> Capital Bank *v.* Cadiz Bank, 172 U. S., 430.
> California Bank *v.* Kennedy, 167 U. S., 365.
> Armstrong *v.* Treasurer, 16 Peters, 281.

The only difference is that in these cases the *act of the Court rather than its words* determines the question of the jurisdiction of this Court over judgments, while we apply the same principle to show that the final act, the only material act of the State Court, was with reference to a subject over which the Federal Courts have exclusive jurisdiction, to-wit: *the private or public character of this land under the treaty.*

> Doolan *v.* Carr, 125 U. S., 638.

Clearly, then, the State Courts were wholly without jurisdiction to render a judgment, the effect of which was to nullify the decree of the District Court.

Part II—EQUITABLE ISSUES.

The equitable branch of this case is practically a separate suit from the ejectment proceeding which has been discussed under the four heads preceding. Our position is that even though the State Courts were without jurisdiction to determine the ejectment proceeding, still they had jurisdiction to determine the equitable proceeding so long as their decision was consistent with the laws of the United States and the decisions of the United States Courts.

The jurisdiction of the Superior Court was by the Revised Statutes of the United States concurrent with that of the Superior Court over the equitable issues presented by the cross-complaint of Jacob Gardner and the answer thereto. It was purely a Federal question and depends for its determination wholly upon the Federal statutes and decisions.

In his cross-complaint Jacob Gardner asserts the same title that he sets up in the supplemental answer in the ejectment proceeding. He also sets up the application of Throckmorton to the Land Department for patent under the act of July 23rd, 1866, and the decision against Throckmorton he asserts that it was erroneous as a matter of law.

Wormouth's answer simply denies the material allegations of Gardner's cross-complaint.

Upon the trial of the equity issues, aside from proving his title, Gardner simply offered in evidence the transcript of proceedings in the Land Department (Tr., pp. 46-118). There was no conflict in the evidence upon these issues of any material character, and they must be determined wholly upon the transcript of proceedings in the Land Department.

The law is very plain upon the proposition involved and does not require any extended discussion in more than to cite the authorities with perhaps some brief statements of their effect. These issues will be discussed under two heads.

Fifth—The absolute right of Gardner's predecessor, Throckmorton, to the patent under the act of July 23d, 1866, upon the simple proof of his absolute title under the treaty, coupled with the fact that the land has been erroneously excluded from the final survey and patent;

Sixth—That the Wormouth patent, having been issued without authority of law, was void as to Gardner, and consti-

taking a fraud upon his title was in equity held by Wormouth in trust for Gardner's benefit.

These will be designated

V—Wormouth's patent invalid.

VI—Wormouth's patent and trust for Gardner.

WORMOUTH'S PATENT INVALID.

Fifth—*The absolute right of Gardner's predecessor, Throckmorton, to the patent under the act, upon the simple proof of his absolute title under the treaty, coupled with the fact that the land has been erroneously excluded from the final survey and patent.*

Throckmorton's proof in the Interior Department upon his application under the Act ofJuly 23d, 1866, shows three essential facts that entitled him to the patent.

A—His own absolute right and title as the lawful successor in interest of the Reed title.

B—That the land he held was an integral part of the land of which juridical possession had been delivered to Reed.

C—That it had been excluded from the final survey and patent.

This entitled him to the patent, because, there being no conflict in the evidence, he was not bound to make any further showing; *the questions of use and good faith upon which the department lays much stress are absolutely concluded by the fact that Throckmorton had a clear title.*

The seventh section of the Act of July 23d, 1866, provides:

> "That where persons in good faith and for a valuable "consideration have purchased lands of Mexican "grantees or assigns, which grants have subsequently "been rejected, or where the lands so purchased have "been excluded from the final survey of any Mexican "grant; and have used, improved and continued in ac- "tual possession of the same as according to the lines "of their original purchase, and where no valid adverse "right or title (except of the United States) exists, such "purchasers may purchase the same."
>
> (14 Stat., 218.)

Under this section two classes of applicants are provided for:

(a) "Where persons in good faith and for a valuable con- "sideration have purchased lands of Mexican grantees "or assigns, *which grants have subsequently been rejected.*"

(b) "Where lands so purchased *have been excluded* from "the final survey of any Mexican grant."

The former class of applicants were those who thought in good faith that they had acquired a valid Mexican title, when, in truth, they had not, *because the grant had been rejected* by the District Court or Board of Commissioners of course, and the Government, acting purely *ex gratia*, gave them a chance to acquire a good title at the established price. The land in this case, *by reason of the rejection of the grant*, was judicially ascertained to be *public land* under the treaty. The patent in this class of cases would clearly be *an actual grant of the land*. The second class, however, relates to lands included in valid Mexican grants, *not only not rejected, but acknowledged and confirmed*, and wherein the Land Department had made an incorrect survey by which it had *excluded land* which should have been included; had failed to conform to the decree of confirmation. In such cases the Act directed the Land Department to issue a patent, the legal effect of which was simply to quit-claim the land to the grantee; it was a simple method whereby the Government acknowledged as valid title the erroneous act of its Surveyor had unjustly clouded.

In the former class (a) the applicant was required to show:

1—Purchase of a *supposed* Mexican title.

2—Good faith.

3—A valuable consideration.

4—Possession.

In the second class (b) the applicant must have shown:

1—The purchase of a *valid* Mexican title.

2—Of land *excluded* from the final survey.

3—Possession.

Upon such showing being made, respectively, the Government granted to the former *the title to the land*—to the latter it issued a patent in effect a quit-claim.

The words in the second part of the sentence, "so purchased," are intended to be the equivalent of the words "purchased lands from Mexican grantees or assigns," the qualifications of "good faith" and "valuable consideration" clearly applying to the class who had no title whatever, as the possession of a valid title would be legally conclusive upon the questions of "good faith" and "valuable consideration." The expression "continued in actual possession of the same as ac-

cording to the lines of their original purchase" simply means "continuous possession."

This analysis, we submit, presents a fair and legal interpretation of the section.

The decision of the Secretary of the Interior (Tr., pp. 126 to 132) is what we have to deal with. The rule to be applied in these cases is this:

That the judicial findings of fact made by the officers of the Land Department in the exercise of their purely incidental judicial powers, in the establishment of a condition precedent to their act in granting a title to public land upon issues of fact properly before them, will not be disturbed and cannot be reviewed by the Courts.

This is submitted as a fair statement of the principle laid down repeatedly by this Court, and epitomized in the following cases:

Johnson *v.* Towsley, 13 Wall., 72.
Rector *v.* Gibbon, 111 U. S., 291.
Bohall *v.* Dillon, 114 U. S., 47.
Widdicombe *v.* Childers, 124 U. S., 400.

This rule has been applied generally where the question arose over lands when the primary title was in the United States, and not in cases where the United States never owned the land, as in the case at bar. In such cases, it seems clear to us in principle, though we find no case exactly of that kind, that even in respect to questions of fact the decision of the Land Department would conclude nothing at all.

The Land Department cannot make title for the Government to land it does not own, which it would do in case its erroneous decision that private land was public land purely upon questions of fact was allowed to stand.

THE LAND DEPARTMENT HAS NO POWER TO DECIDE ANY QUESTION OF TITLE BETWEEN THE UNITED STATES AND THOSE WHOSE CLAIM IS AGAINST, AND NOT UNDER IT.

This involves three conditions:

(a)—The existence of issues of fact.

(b)—cognizable before the department.

(c)—determinable only in the disposition of a valid title of the United States to public lands.

Applying this rule and this analysis to the decision of the

Secretary, we find that he assumed to find three facts against Throckmorton:

1—Want of good faith.

2—Want of valuable consideration.

3—Land not private, but public land under the treaty.

Applying the first condition (a), there were no issues of fact at all, as the transcript of proceedings (Tr., pp. 46-118) clearly shows; simply because the evidence was wholly uncontradicted, unimpeached and unconflicting. There being no facts in dispute, there could be no issues of fact and no findings of fact. This being true, the Secretary was bound to simply decide the law—the legal effect of undisputed facts—without speculating upon probabilities.

The positive, unimpeached and uncontradicted testimony of Throckmomton (Tr., p. 60), the claimant, and of Allardt (Tr., p. 66), one of the two surveyors who compiled the patent map—both testified positively that the map was a compilation—not a survey (as required by law)—and that the "Arroyo Corte Madera del Presidio" (along the blue line A to A2 on the colored map) was the western boundary of the grant. There was not a line, not a scintilla of evidence against that testimony. Not a bit of testimony was offered that the patented western boundary (the yellow line on the colored map) was the true boundary, nor was there a bit of evidence of any kind to prove, or even tend to prove, that it was the line. On the contrary, there was the positive, uncontradicted and unimpeached testimony of the man who furnished the data and helped compile it that the true boundary was the Arroyo Corte Madera del Presidio.

The Secretary could in no wise render any finding against Throckmorton's claim that the western boundary was where he put it. So the evidence did show without any conflict that fact, and the Secretary's opinion can, in the nature of things, be no more than a decision upon the effect of the evidence—the law—and subject to review. He also opines upon Throckmorton's "good faith" and "valuable consideration." Those issues are simulated; they were not before him, for he was not trying the question of issuing a patent that would grant title to the land, but merely one that would be a quit-claim of the United States; but, even were those questions before him, he would be absolutely concluded in their decision in Thockmorton's favor.

It cannot be maintained for a moment that Congress ever

intended that the good faith and consideration of one who held a valid and unquestioned title to lands under a treaty, but erroneously excluded by a mistaken survey, could ever be legally questioned. There being no dispute, no conflict, in the evidence, it is with the greatest difficulty that it can be understood where the Secretary drew his unique conclusions from.

The grant of juridical possession in the *expediente* shows that the western boundary line began "at the solar" and went north to the Arroyo Holon (Tr., p. 145), "where is another forest of redwoods," etc., "from this point taking a direction from north to south," etc., the "examination" in the *expediente* (Tr., p. 87) says they led me north to "another arroyo and forest of redwood trees," etc., and they said it was the boundary with the "Pueblo of San Rafael," which fixes the "Arroyo Holon" as the northern boundary, for then they went south. Now, examine the colored map and see how the blue line on the map, A to A2, exactly conforms to this description, even to the commencement at the "solar" by the "little brook" with the "willow thicket" and the "remains of a rancheria called Anamas." Then, to get the direction, look at the diseno (map) (p. 46A), and see how the western boundary line bears northwest to the west of the Mission of San Rafael; then compare the dotted blue line A2 to D, with the north boundary shown on the *diseno* and at the end of either the way *south* to Tiburon is natural. These lines exactly conform to the grant.

On the other hand examine the yellow line B to B3. It starts beyond the willow thicket ¾ of a mile from the "solar" (Reed's House) and goes northeast to the Holon, but not to the other forest of redwoods, from thence it crosses a marsh to a slough, B3; from there the line goes *northeast* in place of *south*, it makes one end of the Aroyo Holon part of the *western* and not of the *northern* boundary. (Not only was the Holon the northern boundary, but the "forest of redwoods" as well.) This is enough to show how utterly the patent disregarded the grant of juridical possession and the decree of the District Court. Again, the Mathewson survey included 4,460 acres and excluded 1,500 (about), in all 5,900 acres. The patent conveys 7,854 acres, of which one-half of the 1,500 Mathewson excluded is included. The Reeds hal sold the other 750 excluded by the patent, which added to the 7,854, so they had in all the benefit of 8,500 acres, or 2,500 acres more than Juan Reed ever claimed.

Now can this decision of the Secretary of the Interior creating a paper title in Wormouth from the United States to land that never was public land operate to deprive us of an otherwise unquestioned title fortified by sixty years' continuous possession.

A decision of the department in excess of its authority is void:

Simmons *v.* Wagner, 10 U. S., 260.
Polk *v.* Wendell, 9 Cranch., 303; also, 5 Wheat., 303.
Frisbie *v.* Whitney, 9 Wall., 187.

These cases hold that the act of the Land Office granting a patent for lands already sold is void for want of authority, but in these cases the primary title was originally in the United States. *A fortiori*, then, it is true, when the United States never had title.

In brief, Throckmorton complied with the statute, and the department could only grant him the quitclaim patent applied for not, and its decision in Wormouth's favor is void.

WORMOUTH'S PATENT A TRUST ONLY.

SIXTH—*That the Wormouth patent, having been issued without authority of law, was void as to Gardner, and constituting a fraud upon his title was in equity held by Wormouth in trust for Gardner's benefit.*

Upon this we simply cite the authorities.

Johnson *v.* Towsley, 13 Wall. 72.
Ricter *v.* Gibbon, 111 U. S. 291.

And the same is respectfully submitted.

GEORGE W. MONTEITH,
Attorney for Plaintiff in Error.

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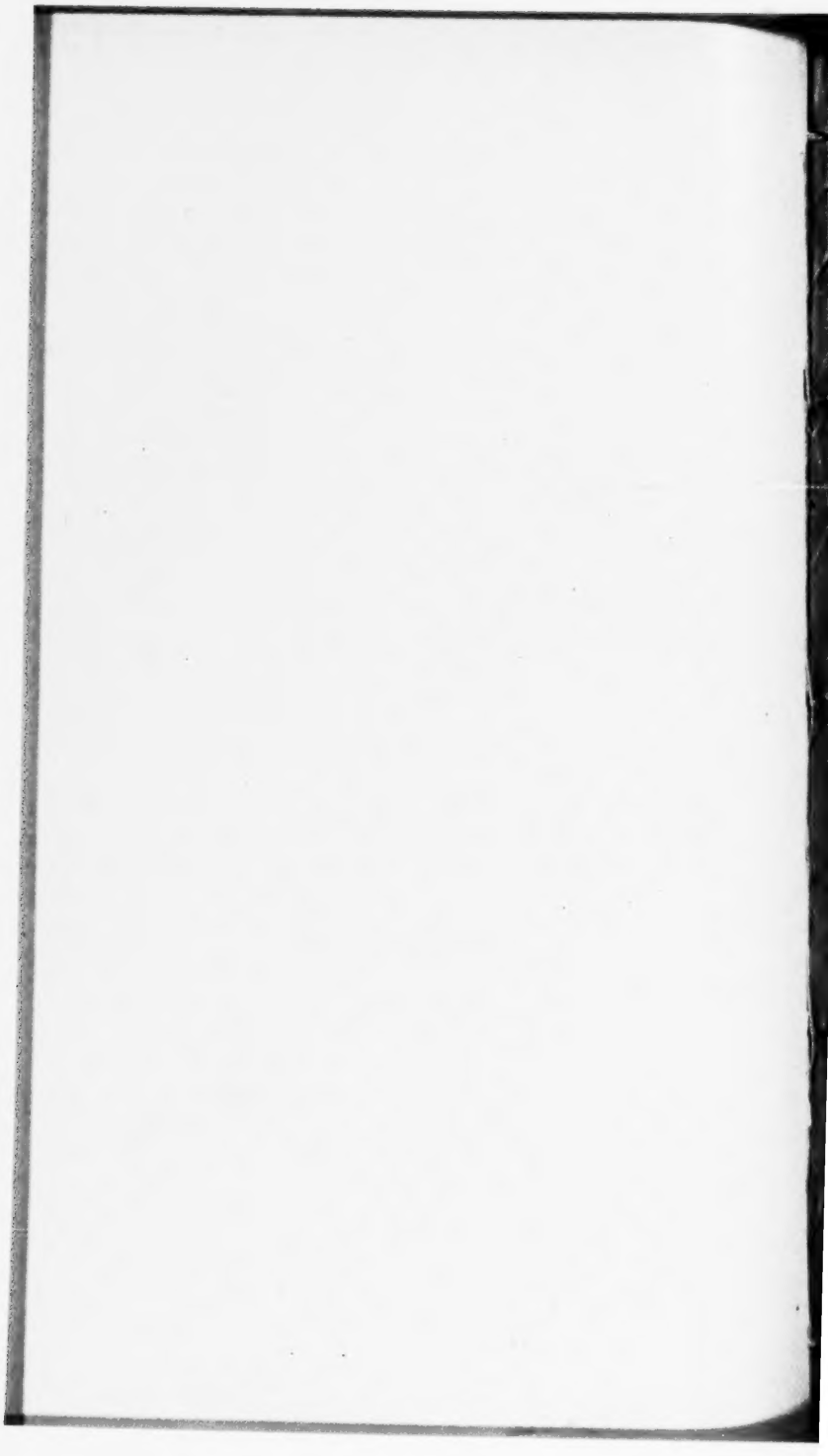

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No. 143.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 143.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR.

vs.

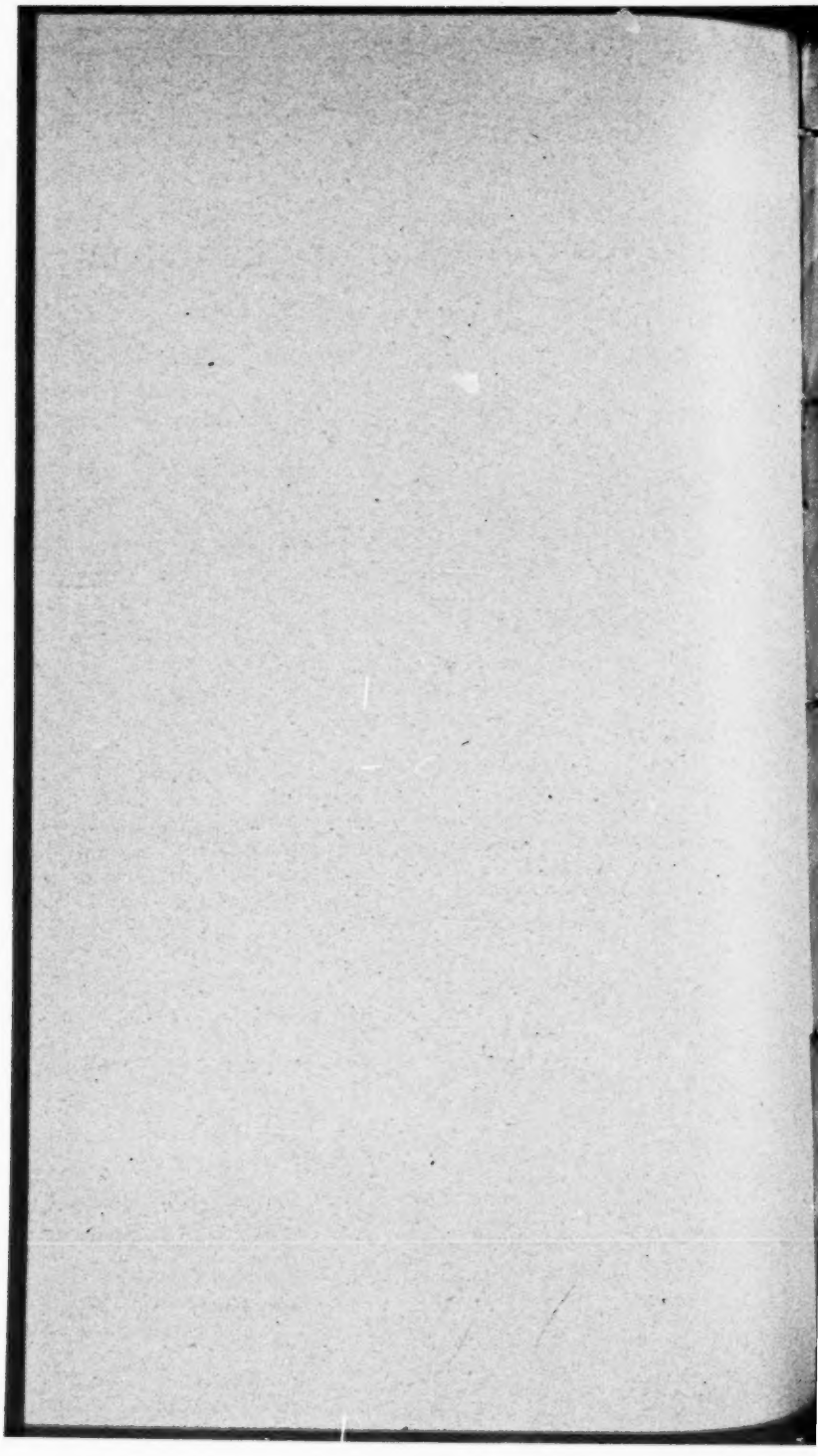
L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED,
DEFENDANT IN ERROR.

BRIEF IN REPLY OF PLAINTIFFS IN ERROR.

GEO. W. MONTEITH,
ATTORNEY FOR PLAINTIFFS IN ERROR.

(17,533.)

FILED JANUARY 1901.



Supreme Court of the United States.

OCTOBER TERM, 1900.

NO. 143.

JACOB GARDNER AND PETER GARDNER,

PLAINTIFFS IN ERROR.

vs.

LEWIS H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED,

BRIEF IN REPLY TO PLAINTIFFS IN ERROR.

The position assumed by our adversary makes it perhaps advisable to briefly reply to his assertion that this court is without jurisdiction to determine the question presented on the merits.

No attempt whatever is made by opposing counsel to answer the six propositions we advance on the merits, and it seems to us that they are all so plainly within the operation of section 709 R. S. that it is almost superfluous to make any extended discussion of them; still, we will in a few words analyze and present the jurisdictional questions and review the authorities defendant in error offers.

Jurisdiction.

Each of the six points raised by us will be shown to present a clear federal question under section 709 R. S.

To begin with that section presents three general classes, that cover nine separate heads; of cases within the purview of that section.

ANALYSIS OF SECTION 709 R. S.

The Supreme Court of the United States under this section has power to review any judgment or decree of a State court, that is:

First—A final judgment or decree.

Second—Of the highest court in the State empowered to render it.

Third—Embraced in one of three classes to wit:
CLASS A.
Where there is drawn in question the validity of:

1. A treaty of the United States.
2. A statute of the United States.
3. An authority exercised under the United States.

Wherein the decision is against the validity.

CLASS B.
Where there is drawn in question, on the ground of being repugnant to the Constitution, treaties or laws of the United States the validity of:

4. A State statute.
5. An authority exercised under a State,

Wherein the decision is in favor of the validity.

CLASS C.
Wherein is claimed and specially set up under:

(a) The Constitution of the United States.
(b) Any treaty of the United States.
(c) A statute of the United States.
(d) A commission held under the United States.

Either.

6. A title.
7. A right.
8. A privilege.
9. An immunity.

Wherein the decision is against the same.

I

The first question both in order and importance is that which relates to our absolute title under the treaty of Guadalupe Hidalgo to the land in dispute.

The vitality of that title is derived wholly from that treaty, as a specific right and title to a part of the "Rancho Corte Madera del Presidio," or Reed Ranch, under its provisions.

The act of March 3, 1851, gave to the United States District Court of California exclusive jurisdiction, so far as California was concerned, to finally adjudicate all such rights and titles under the treaty, subject only to an appeal in each case to the Supreme Court. This was done and on January 14th, 1856, that court made and entered its decree which became final, confirming unqualifiedly the Reed title accordingly as laid down in the grant of juridical possession. The land department refused to give effect to this title in part by leaving the land in dispute out of the quit claim patent it gave to

the Reeds for the balance of the grant after they had sold the excluded portion to our predecessors in estate, subsequent to the Reeds. Because the Land Department did so, *and for no other reason whatever*, the Superior Court of Marin County, California, also refused to give effect to the title as to the excluded portion and rendered judgment ejecting us *solely because the land department had decided against us*. Neither in the department, whose proceedings were all before the Superior Court, nor in that court was there any evidence adduced showing, or even tending to show, the land was not an integral part of the grant, on the contrary, we both plead and proved our complete deraignment of title from Reed, the continuous possession of ourselves and our predecessors from 1835 down to the present time, and that the very definite and certain lines of the grant of juridical possession included this land. The evidence being without conflict presented only questions of law as to its legal effect. The Superior Court refused to give effect to our title, set aside the decision of the United States District Court, and denied our plain right to the land so clearly and undisputably shown by the evidence to be wholly ours under the treaty.

Applying the above analysis we find:

It is a final judgment, rendered by the highest court empowered to render a decision in the case (Supreme Court of California), and embraced in subdivisions 3 of class A and 6 and 7 of class C; being under the former (class A–3) a decision against *an authority* (that of the U. S. District Court) *exercised under the United States* (*to finally adjudicate the title*) and under the latter (class C, 6 and 7) a decision against *a right* and *a title* that was claimed and specally set up (in the pleadings) specifically under a treaty (Guadalupe Hidalgo) and generally under the Constitution and laws of the United States.

II

The foundation of the Wormouth title was his patent, and before he could even question the validity of our title he must present a patent that if the land should prove under the treaty to be public land, would operate as a valid grant of the Government title. If his patent was void in either case he could not maintain ejectment. If his entry was void the patent upon it is necessarily so—this we clearly demonstrate *upon the merits* in our opening brief. Assuming then that the entry and patent were absolutely void is then a decision of a state court, that boldly sets aside the laws of the United States and the decisions of its courts and validates an entry and patent void by those laws and decisions, reviewable under section 709, R. S. If so, under which of the nine

heads and within which of the three classes will it be found in the above analysis?

Is it not plainly within the purview of number 5 in class B--"An authority exercised under a state," *drawn in question as repugnant to the Constitution, treaties or laws of the United States*, in a case where the decision of the highest court in the State is in favor of the validity of the authority.

The essential "authority exercised under a statute" is the authority of the Superior Court of Marin County to try and determine cases. Its exercise of its authority to override the laws of the United States (its statutes and the decisions of its courts, its written and unwritten laws) and to hold valid that which is void under those laws is certainly the exercise of its authority in a manner that is "repugnant" to such laws.

Then with the decision of the State Supreme Court in favor of the validity of the authority of the Superior Court, to so overturn the laws of the United States, it meets every requirement of the section.

III

The third question, that the right and title we assert under the treaty, is *res judicata*, is reviewable as a question as to the validity of "an authority exercised under the United States" wherein the decision was against the validity; the finality of a final judgment rendered under the Act of March 3, 1851, has been repeatedly held by this court to be unquestioned.

"The question of its correctness is forever closed."

United States *v.* Halleck, 1 Wall. 453.

It is well expressed by Mr. Justice Field at circuit court wherein he says:

"The validity of the decree and of the grant upon which "the claim of Yorba was founded was thus forever put at "rest. From that day it could never be successfully ques- "tioned in any form of procedure or by any tribunal known "to our laws. It was a closed question for all time.

United States *v.* Flint, 4 Saw. 56.

It is also reviewable as a decision of the highest court in the state againts the validity of a federal statute drawn in question in the case; as it in effect holds that the statute of March 3, 1851 is invalid when it provides that a determination under its provision *is final* (Class A—2) and is still further reviewable as a decision against a *right* specially set under the Constitution, treaties and laws of the United States (Class C—7) the right being that of having the decision of the district court recognized as final and *full effect given to the title it sustains.*

IV.

The fourth point are that the state courts are without jurisdiction, *of the subject matter of the actual case presented*, in the ejectment proceeding is reviewable as a decision in favor of the validity of an authority exercised under the state drawn in question as repugnant to the Constitution, treaties and laws of the United States. (Class B—5.) The authority of the Superior Court of Marin County to again call in question and assume jurisdiction to re-determine the question of this title contrary to the previous final determination of the district court under the Act of March 3, 1851 which confers exclusive power on the district court so to do, is certainly repugnant to that express law of the United States.

V.

The fifth question—the first nnder the equitable branch of the case, is as to our right to a patent in the nature of a quit claim, under the provisions of section 7 of the Act of July 23, 1866, (14 statute 218) presents a definite issue upon undisputed evidence to our right to this patent, (Class C—7) as a *right* that was *specially claimed and set up*, under a treaty (Guadalupe Hidalgo) and a statute (act of July 23, 1866) wherein the decision was against our right. (See opening brief pp. 65 *et seq.*

Review of Opponent's Authorities.

Defendant in error says that as the question is "one of boundary alone this court has no jurisdiction."

It is not a question of boundary at all, *but a question of title* to what was admittedly an integral part of the grant, unlawfully excluded by the land department refusing to give full effect to the decree of the District Court.

By cutting off a portion of the land, necessarily the boundaries were altered, *but there is no question as to where they lay.* The boundary question, if any, was which set of boundaries were valid, *not where settled boundaries were physically located.*

The question as to *what the boundaries are*, is always *a question of title*, while that, as to where the boundaries are actually located is a pure question of fact: as in the case of the location of a boundary between neighbors for even though both of their titles may have once been treaty rights, the dispute between them as to the location of the dividing line, raises only an ordinary question of fact, and where it in no wise involves the *title* this court clearly is without jurisdiction.

This is all the three cases cited by our adversary hold.

Almonester v. *Kenyon*, 9 How. 1, simply involved the *fact* as to *where* the dividing line was. Neither *title* was called in question. In that case Mr. Justice Catron for the court said:

> "Now that this court has no jurisdiction under the "25th section of the Judiciary Act of 1789, to re-"examine the decision of a state court which drew in "question the mere fact of where a dividing line be-"tween two tracts of land was, is too plain for dis-"cussion, * * * * the fact is found that no "interference exists between the tracts of land respec-"tively claimed and with this settled fact we have to "deal.

Lanfear v. *Hunley*, 4 Wall 204 was an action that involved a dispute as to the location of a boundary. The boundary was admittedly the "Bayou Crocodile," but its location—which of several bayous (4 Wall. p. 205) it was, was *the fact* in dispute. At the time of the suit, a certain bayou known as the "Bayou Crocodile" was the only one then known by that name and Hunley claimed it was the one referred to in the grant while the plaintiff Lanfear claimed another or several others were so called when the grant was made.

The only question then was which bayou was the "Bayou Crocodile," a mere fact in nowise involving the *title*. It was a question as fo *where* the boundary the "Bayou Crocodile" was and not as to *what* constituted the boundaries included in the title.

Mr. Justice SWAYNE for the court very correctly said:

> "The fact that the land to which the boundary re-"lates is held by a title derived from an Act of Con-"gress, does not change the result. (Italics ours.) "*If the title be admited*, as recognized by the act, its "location upon the land is a subject wholly within "the cognizance of the State tribunals * * * *."

> "In such cases our anthority is limited to errors re-"lating to the title. *If any such are committed it is our "duty to correct them* * * * * *. In the case "before us, the Supreme Court of Louisiana construed "correctly the several acts of Congress relating to "the subject of the controversy * * *. *Full effect "was given to the title.* The error, if any were com-"mitted, *was in locating it upon the land.*"

Dower v. *Richards*, 151 U. S. 658, has no bearing upon any conceivable view of this case. Here there is no conflict in the evidence, the questions being all of law upon the legal effect of undisputed facts, while in that case Mr. Justice Gray for this court said:

> " The principal ground on which the plaintiffs seek
> " to reverse the judgment of the Supreme Court of
> " California is that its decision in matter of fact was
> " erroneous and contrary to the weight of evidence in
> " the case. But to review the decision of the State
> " court upon the question of fact, is not within the
> " jurisdiction of this court."

This decision clearly has no application here as the evidence being absolutely without conflict there is no question of fact in the record.

Defendant in error next asserts that three questions of fact were involved in the contest before the Land Department (see transcript Pro. in Ld. Tr. pp. 46-118), which he enumerates:

(a) " *Was the land in controversy ever within the grant to Reed?*"

In other words, was the land *public or private land under the treaty?* A question beyond the power of the department to determine whose authority is limited to deciding questions between those who claim *under* and not *against* the Government.

That question as it was presented to the department, as we have already shown, was a pure question of law—of the legal effect of testimony in which there was no conflict whatever.

(b) " Was Throckmorton a purchaser in good faith and for a valuable consideration within the meaning of the act of July, 1866."

This was also considered on unconflicting testimony, but as Throckmorton proved a complete title to the land as a right under the treaty as already shown (opening brief p. 65) these questions could not be raised and their decision amounted to nothing whatever.

(c) " Had Wormouth complied with the law so as to be entitled to his patent?"

Was shown also upon unconflicting testimony of Wormouth himself, that his entry was void as a pure matter of law, because he admitted it was made when our predecessors were in possession under at least color of title.

Under this head he cites:

Moreland v. Page, 20 How. 252, a case having no possible application to this controversy and wherein Mr. Justice Grier speaking for the court, said: " It is a mere question of boundary between two neighbors, both admitted to have valid grants from the United States."

Aurora, etc., Co. v. Mining Co., 34 Fed. 515, was a case between rival claimants to a mining claim when the decision

of the department on some questions of fact, *that were properly cognizable before it*, were controverted and the Circuit Court, Sabin J,, properly held: (italics ours.)

> "By law the officers of the Land Department are "charged with the whole business of *transferring the "government title to public land* and they are exclu- "sively charged with that duty. *Within the sphere "of their duty* their decisions upon questions of fact "are conclusive upon all parties. They may, like other "officers. err in regard to matters of law and the cor- "rect interpretation thereof. In such cases upon "proper proceedings, had for that purpose, their judg- "ments or decisions may be reviewed by the courts and "corrected of erroneous."

The case at bar being on unconflicting evidence is reviewable in any event, but it is not as Judge Sabin puts it: "*Within the sphere of their duty.*" That "sphere of duty" does not extend to deciding cases between the United States or those claiming under them on the one hand and those who claim against and deny the primary title of the Government on the other.

Telluride Power Co. v. Rio Grande, etc., Ry., presents nothing involved in this case. Mr. Justice Brown in speaking for the court, said:

> "These were local and not federal questions. The "jurisdiction of this court in this class of cases does "not extend to questions of fact or of local law, which "are merely preliminary to, or the possible basis of a "federal question."

Craig v. Lietensdorfer, 123 U. S. 189, involved merely a question of practice—of prematurely bringing an action in equity on the ground of fraud before the department had acted, and Mr. Justice Matthews for the court said:

> "When the department had exercised its discretion "and exhausted its functions, the legal and equitable "effect of what it has done or failed to do, may be "drawn in question, when necessary to the determina- "tion of conflicting rights between private parties in "a judicial proceeding; but as long as the alleged "rights, which are the subject of contention, are in the "course of adjudication, by the special tribunal to "which they are referred for settlement, the function "of that tribunal cannot be displaced by the courts of "justice."

Marquez v. Frisbie 101 U. S. 473.—is similar to the preceding case and for the court Mr. Justice Miller said :

> " It is plainly apparent from this, first, that the " defendants had not the legal title ; second, that it " was in the United States ; and third, that the matter " was still *in fieri* and under the control of the land " officers."

Vance v. Burbank 101 U. S. 519.—Mr. Chief Justice Waite for the Court said :

> " The question in dispute is one of fact ; that is to " say, whether Scott, when he demanded his patent " certificate as against the other contesting claimants " *(for a government title)* had resided on and cultivated " the lands in dispute four successive years," etc.

Counsel cites three cases in support of the proposition that " when a survey *conform to the decree* confirming the *grant, as nearly as practicable* the survey will not be disturbed even on direct attack." We do not contest a plain proposition of law like that, but it has no bearing on the matter, for this case presents no such question. In this case the survey shows no relation to the decree whatever—it lays out an entirely different set of boundaries from the very definite ones presented in the grant if juridical possession to Reed and that constituted the boundary lines of his land *ten years before the Mexican War and twenty years before confirmed by the District Court.*

The very point here is *that the survey does not conform to the decree*, either " as nearly as practicable " or at all. It plainly violates it and assumes to destroy, in part at least, a valid title under the treaty, more than that there is not even a survey merely a *compiled map.*

United States v. *Flint*, 4 Saw. 61, on the survey question in the Circuit Court said :

> " Whether the survey conforms to the claim or var- " ies from it, is a matter with which the courts have " nothing to do * * * *. The courts can only " examine into the correctness of a survey when, in a " controversy between parties, it is alleged that the " survey made infringes upon the prior rights of one " of them : and can then look into it only so far as may " be necessary to protect such rights. They cannot " order a new survey or change that already made "

This simply means that the courts cannot trench upon the province of the executive in the performace of *executive acts.*

No more than can the executive trench upon the province of the judicial department as it in this case has when the land office assumed to re-adjudicate a settled land title.

The sixth question raised by us being conceded both by the state court and by our opponent, in case we are right in our contention upon the fifth, it is unneccessary to discuss it at length.

Respectfully submitted,

GEO. W. MONTEITH,

Attorney for Plaintiffs in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

v.

L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED.

No. 143.

PETITION FOR REHEARING.

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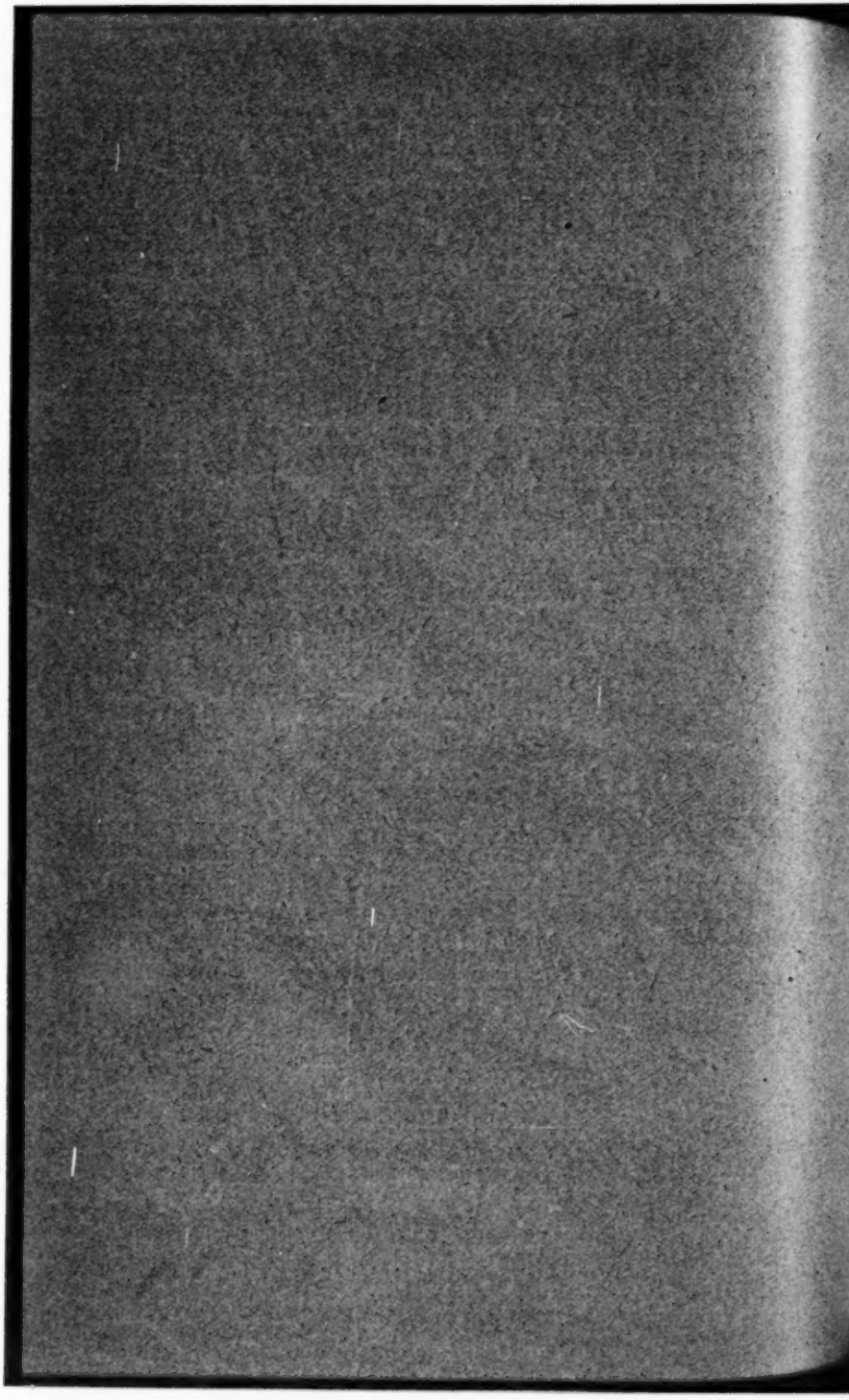

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

JACOB GARDNER AND PETER GARDNER, PLAINTIFFS IN ERROR, v. L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED.	No. 143.

PETITION FOR REHEARING.

Plaintiffs in error deraign title through mesne conveyances from one Juan Read, grantee of the Mexican Government, on October 2, 1834, of the Rancho Corte de Madera del Presidio, and continuous possession or assertion of right thereto during the more than half century which has since elapsed. In all judicial proceedings hitherto affecting this land, wherein such derivative owners have affirmatively asserted title and right of possession against intruders thereon, they have uniformly prevailed. In present case they are parties defendant; the attack was made upon their title, and their defence has been overruled.

While the opinion of this honorable Court correctly holds as settled principles of law (*a*) that findings of fact by the Land Department in cases falling within its jurisdiction are, in the absence of fraud or mistake, controlling upon the judiciary, and (*b*) that the original power to make and correct surveys rests exclusively with the Land Department, it is yet most respectfully submitted that in the case at bar just and controlling exception to the application of these general principles clearly exists.

I.

The opinion correctly concedes that "the grant was one "not of quantity, but by metes and bounds." * * *

Section 7, Act of July 1, 1864 (13 Stats., p. 332), whereunder the grant was finally surveyed, expressly provides:

"That it shall be the duty of the Surveyor General of "California, in making surveys of the private land claims "finally confirmed, *to follow the decree of confirmation* "*as closely as practicable, whenever such decree designates* "*the specific boundaries of the claim.*"

The decree confirming this grant recites the initial boundary call thus:

"Commencing from the solar which faces west at a "point at the slope and foot of the hills which lie in that "direction and on the edge of the forest of redwoods "called Corte de Madera del Presidio, and running from "thence in a northwardly direction four thousand five "hundred varas to an arroyo called Holon where is "another forest of redwoods called Corte de Madera de "San Pablo."

Instead of *following* the decree and marking the boun-

daries in accordance with its initial and consecutive calls, the patent survey ignores this binding statutory requirement and duty by proceeding in the opposite direction. From the initial point named in the decree (the "solar," or house lot), the call therein is

"thence in a *northwardly* direction four thousand five "hundred varas, to an arroyo called 'Holon,'" etc.;

Whereas the patent survey (Rec. 119) begins at a described post standing "on the place formerly known as "the Solar, 'which faces west,'" and by prescribed course, thence proceeding "*south* 2 *chains* 45 *links to the* "*center of the Arroyo Corte Madera del Presidio*, being "the northerly boundary of the Rancho 'Sausalito' Sta- "tion; thence following the center of said arroyo through "a dense thicket of willows formerly known as the "'Sausal,' south 33 degrees 45 minutes east, 5 chains 85 "links to Station," and continuing southerly to the marsh or bay.

And the last two calls of the patent survey purport to cover the *initial* call of the decree by extending the line *south* instead of *north*, as shown in the extract from the field notes at page 119 of the Record.

It thus clearly appears from the record that the surveyor plainly violated and ignored the law in failing to thus "follow the decree of confirmation as closely as practicable, "whenever such decree designates the specific boundaries "of the claim," and likewise ignored the decree in thus unlawfully seeking to establish the boundaries called for therein by running his lines in a constant direction, directly *opposite* to the boundary calls as given in the decree. The result was and is that the patent survey and subsequent patent erroneously included lands not within

the calls of the decree, and through like error of law excluded the land here in controversy, which plaintiffs in error contend was and is embraced within such boundary calls of the decree. These dual errors of inclusion and exclusion are demonstrated by examination of the original diseno (Rec. 46, A). This diseno is made part of the decree of confirmation and is "the map" spoken of at the end of the decree to which, with the record of juridical possession, "reference is to be had." By this diseno is disclosed the true course and location of the westerly boundary of the grant as thus confirmed, and as extending northwardly and on a line with the church building marked "Mission de San Rafael;" thence turning to the eastward and reaching the waters of the Bay of San Francisco, on almost a due east and west course, excluding the possibility of inclusion within the confirmed grant of the waters of "Corte de Madera Slough," which water course is located on the diseno, to the north of the northern boundary, as fixed thereon.

This description in the diseno is in exact accord with the second call of the decree, which is "thence by the "waters of the said arroyo to the Bay of San Francisco, "10,000 varas to the Point Taburon," etc.

Comparing the patent survey (Rec. 1) with this diseno, will disclose at once that the former wholly ignores the western boundary line of the ranch as clearly delineated on the diseno, and as clearly described in the record of juridical possession (Rec. 86), and in full harmony with the call of the diseno in the decree of confirmation. *The decree and the diseno clearly embrace the land here in dispute.* It is excluded only by the patent survey made in flat contradiction (1) of the statute and (2) of the plain boundary calls of the decree, AND HERE ARISES THE ONLY BUT CONTROLLING CONFLICT BETWEEN THE DECREE AND THE SURVEY WHICH AFFECTS THE PLAINTIFFS IN ERROR.

Manifestly the decree of confirmation herein establishes both title and absolute controlling boundaries. It can not be challenged either as to title or boundaries, nor the rights of the grantees and derivative owners thereunder destroyed by an official survey which, upon the face of the record, is so clearly erroneous. While the Land Department was vested with power to survey these private claims, its duty was defined and limited to *following* the decree of confirmation. (*Van Reynegan* v. *Bolton*, 95 U. S. 33). When, as here, it radically departs therefrom, it is impossible to say that the rights of the grantees to property whereof they have had possession since the original grant from the Mexican Government in 1834, are hence destroyed, or that the decree of confirmation and its controlling boundaries may not be successfully invoked by them in defense of a suit initiated by one claiming under adverse claim of title. Otherwise the judicial decree which establishes both title and boundaries, would be subordinated, in legal effect, to the act of an administrative officer in assuming to establish such confirmed boundaries, and such administrative action, if held controlling, would amount to divestiture of title established by such prior decree.

It may well be that in grants of quantity within larger boundaries or of place, without designated boundaries, controlling discretion is vested in the Land Department to finally locate same by survey and patent. But where the decree of confirmation, as in present case, itself determines boundaries by express recital, it is submitted such judicial decree cannot at any time or place be held subordinate to the subsequent action of an administrative officer, in attempting to survey and patent the boundaries as thus defined and confirmed. Otherwise the confirmed grant could be located by the decree upon one part of the

earth's surface, and by the survey and patent upon a totally different part, and the grantee left without defence against subsequent intruders upon the tract as really confirmed and possessed by him. We do not understand that such conclusive or controlling effect can be thus given the survey and patent of confirmed private land claims in California. While the Act of 1864 above noted cast upon the Land Department the primary duty of surveying confirmed private land claims in California, and (as of course) of determining the locus of boundary calls, patent errors in performance of such duty certainly are not and cannot be beyond judicial remedy. In *Van Reynegan v. Bolton* and involving this same grant, this Court said:

"That is a question which must, *in the first instance*, be "determined by the Land Department in carrying the "decree into execution by a survey and patent."

Thus clearly implying that error of the Land Department therein is not beyond judicial review.

II.

Plaintiffs in error urged that the locus of the boundary calls as given by the decree of confirmation were established in this case by uncontradicted testimony. The opinion declares that such position "ignores the survey, "which is in itself evidence and that of a most persuasive "kind," which even in a proper case "can be overthrown "only upon satisfactory evidence of mistake."

But the point as urged by plaintiffs in error was and is that the survey as shown by this record and comparison thereof with the decree of confirmation and the express command of the statute that the survey must *fol-*

law the decree, demonstrates its utter invalidity both in law and fact; that in such case and upon so plain a record, and in all justice, a survey so manifestly invalid ought not to be permitted to be set up against them as conclusive nor deprive them, in defending their right to this property, of relying upon the decree of confirmation as the source and the controlling and conclusive basis of their title. In short, accepting the general doctrine as to the finality of a survey, it can and should apply only where the survey has been made in accord with the law and with the controlling decree of confirmation which it purports to execute; whereas, where, as here, both the decree and law are so plainly violated, the *decree* must control for their protection as against such an erroneous and invalid survey.

III.

The opinion declares that the undersigned have mistaken their remedy, which was "by application to the "Land Department to correct the survey, and failing to "secure correction there, a direct proceeding in the "courts in which the Reed heirs should have been par-"ties, and in which they could have been heard to defend "the survey and patent."

But with great respect it is submitted—

First. Application to the Land Department to correct the survey involved refusal to accept the survey as made and the patent as issued thereon. *Leroy* v. *Jamison*, 3 Saw. 369, 392. That was wholly within the control of the Reed heirs and not of these plaintiffs in error or their immediate grantor, who was the record owner of the land here involved when such survey was made and patent issued. The Reed heirs then owned no land of the grant outside the survey and patent.

Second. The plaintiffs in error here did not initiate this litigation. They were sued and were and are the parties defendant, and when attacked were compelled to defend.

Third. No direct proceedings in the Courts to reform the survey and patent was open to these plaintiffs in error within their understanding of judicial procedure. No decree therein could bind the United States nor operate by estoppel or otherwise upon the Government or its grantees. Hence and where, as here, their adversary presents the Government's patent they feel keenly the utter want of judicial remedy open to them at any time heretofore in any suit to reform the survey which would bind the Government or its grantees, and notwithstanding the suggestion of the opinion as to any such open remedy for relief they ask this Honorable Court, in all fairness *what* proceeding, judicial or executive, could have been available to them in the affirmative protection of their property rights? Clearly none. They could only defend when attacked, and to be told on such defence that they are concluded through failure to pursue a remedy never open to them, and at the same time held concluded by a record which they could not challenge or elsewhere seek to correct or reform, is, they finally submit, practically taking their property without due process of law, by denying in *this* case their right to raise and determine essential issues because concluded by some other proceeding whereto they were not parties, and to correct which no remedy, judicial or otherwise, is or has been open to them.

Hence it is that with the present judgment of this Honorable Court taking from them property held by them and their predecessors in interest for over half a century, they earnestly and most humbly beg rehearing of their cause by this Honorable Court.

17030

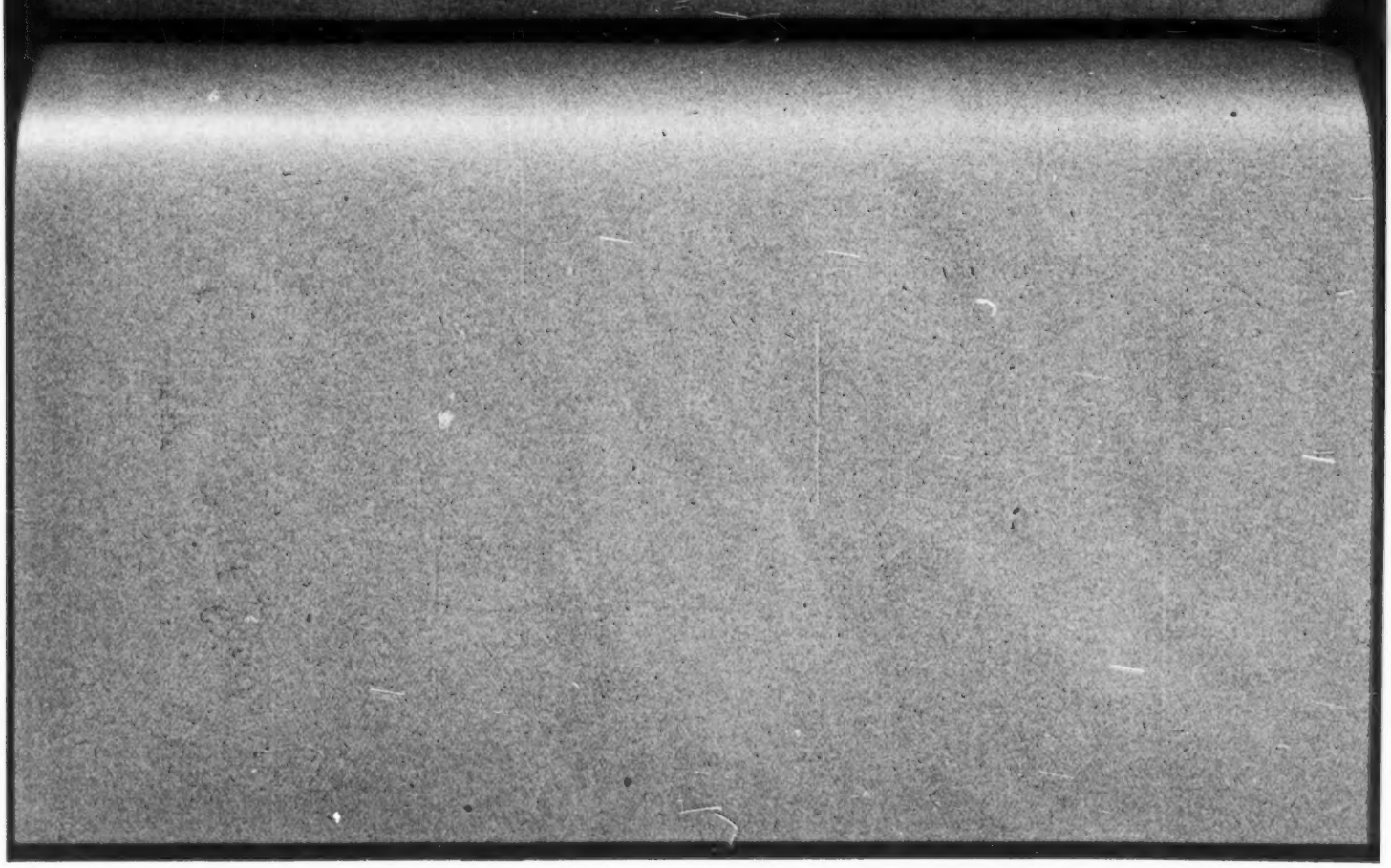
We most respectfully submit that we know of no rule of law which metes out equal justice to the Government and its citizens other than to obey the mandate of the final decree of confirmation. Therefore, we believe the case should be sent back and tried upon that basis. No finding of the trial court appears showing this land is *not* within the boundaries declared by the final *decree*, and since the decree is conclusive as investing title, possession thereunder for nearly sixty years should give us the right to have fully heard and determined the important and vital question whether *this* land is within the boundaries named in such decree, as by this record so plainly appears. This is the vital point in the case—the plain conflict between the decree and the survey. The decree plainly says this land *is* confirmed to us; the survey alone declares that it is not. The Land Department alone has thus created this conflict, and this record plainly shows it. It is *not* a matter of conflicting oral testimony whereon findings of fact may be made by the Court, but is matter of record not controlled or affected by such findings and whereon we should not be held responsible nor be concluded by such wrongful and erroneous action of the Land Department. It is hence a question of law only, viz., plain conflict between the *decree* which controls and the *survey* which should not.

Respectfully submitted.

JACOB GARDNER AND
PETER GARDNER,
Plaintiffs in Error.

The purpose of foregoing petition is to distinctly raise for consideration the question of predominance between the decree of confirmation and the survey, which is upon its face antagonistic to the decree. This conflict prevents a fair trial between the parties, if, as we believe, the foregoing petition presents a meritorious question of law.

A. B. BROWNE,
ALEX. BRITTON,
Attys. for Plffs. in Error.



No. 143

Brief of Black for D.C. (ins.)

17033

FILED

OCT 10 1899

JAMES H. McKENNEY, Clerk.

No. 419

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed October 10, 1899.

JACOB GARDNER et al.,
Plaintiffs in Error,

Against

EBENEZER WORMOUTH,
Defendant in Error.

Notice of Submission of Motions to Dismiss and Affirm, etc.

ALFRED L. BLACK,
Attorney for Defendant in Error.

C. K. BONESTELL,
Of Counsel.

Filed ..... *1899.*

IN THE SUPREME COURT OF THE UNITED STATES.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

Against

EBENEZER WORMOUTH, DEFENDANT IN ERROR.

The defendant in error, by his counsel, appearing in that behalf, moves this Honorable Court to dismiss the writ of error in the above-entitled cause, for want of jurisdiction, because the judgment and decree which is sought to be reviewed by said writ is a judgment duly made and given and entered by the Supreme Court of one of the United States, to wit, the Supreme Court of the State of California, and it fully appears from the record herein:—

First. That no Federal question is involved in the action in which said judgment was rendered, either in the Superior Court or Supreme Court, of the State of California.

Second. It does not appear from the record that the validity of any treaty or statute, or an authority exercised under the United States, was at any time drawn in question in said action.

Third. It does not appear from the record that the validity of any statute, or authority exercised under any State has been drawn in question in said action, upon the ground of its being repugnant to the Constitution, treaties or laws of the United States.

Fourth. That it does not appear from the record, that any title, right, privilege, or immunities claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States has been drawn in question in said action.

Fifth. That it does appear from the record that the only question involved in said action was a question of fact—namely, the western boundary of the Rancho Corte de Madera del Presidio.

And the said defendant in error by his counsel, as aforesaid, also moves this Court to affirm the judgment and decree to review which

said writ of error was herein brought, because it is manifest from the record herein that the reasons assigned for taking the writ of error were and are frivolous, and that it was taken for delay only.

ALFRED L. BLACK,
Attorney for Defendant in Error.

C. K. BONESTELL,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

JACOB GARDNER ET AL., PLAINTIFFS IN ERROR,

Against

EBENEZER WORMOUTH, DEFENDANT IN ERROR.

Notice of Submission of Motions to Dismiss and Affirm.

TO GEORGE W. MONTEITH, ATTORNEY FOR PLAINTIFFS IN ERROR:—

Please take notice that on Monday, the 9th day of October, 1899, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States, at the courtroom of said Court, in the Capitol Building, in Washington, D. C., for the decision of said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with said motions in support thereof.

ALFRED L. BLACK,
Attorney for Defendant in Error.

C. K. BONESTELL,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1899.

JACOB GARDNER ET AL., PLAINTIFFS IN ERROR,

Against

EBENEZER WORMOUTH, DEFENDANT IN ERROR.

Statement of the Case.

In July, 1892, defendant in error, commenced this an ordinary action in ejectment against plaintiffs in error, in the Superior Court of the State of California, in and for Marin County. The complaint was answered, and subsequently a cross-complaint was filed by plaintiffs in error.

It is unnecessary to make a further statement, inasmuch as the facts are fully set out in the pleadings and findings of fact; the opinion of the Supreme Court of the State being also by rule a part of the record, is included herein.

The complaint in said action is as follows:—

Complaint.

[Title of Court and Cause.]

"Ebenezer Wormouth, plaintiff, complains of Peter Gardner and Jacob Gardner, defendants, and for cause of action avers:—

I. That on the 1st day of February, A. D., 1891, the plaintiff was, and for a long time prior thereto had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to possession of that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit: Beginning at a post marked 'C. M. P. 180,' said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to post marked 'C. M. P. 181;' thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26 00 chains more or less to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of section 28,

and lot 3 of section 29, township No. 1 north of range No. 6 west, M. D. M., containing 46 acres and 26 hundredths. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

II. That on, to wit, the said first day of February, A. D., 1891, and while this plaintiff was so possessed and entitled to the possession of said land and premises, the said defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same, (except that portion thereof bounded and described as follows, to wit: Beginning at a post marked 'C. M. P. 180'; running thence due north 2.45 chains to a post marked 'C. M. P. 181'; thence north 9 degrees east to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwesterly along said fence to the said creek; thence descending the said creek to a point of beginning); and ever since have wrongfully and unlawfully withheld and still withhold the possession thereof from this plaintiff, to his damage in the sum of five hundred dollars, ($500.00).

III. That the reasonable monthly value of the rents and profits of said land and premises is about Fifty Dollars per month, and that by reason of the unlawful withholding of said land and premises by defendants as aforesaid, plaintiff has been deprived, and by the continuance thereof will be deprived of the use and occupation of the same to his loss and damage in the sum of Fifty Dollars per month.

SECOND.

And for another, further and separate cause of action, and for the purposes of equitable relief, plaintiff avers and shows:

IV. That on the 1st day of February, A. D., 1891, the plaintiff was, and for a long time prior thereto had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to possession of that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit: Beginning at a post marked 'C. M. P. 180,' said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 245 chains to a post marked 'C. M. P. 181'; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of section 28

and lot 3 of section 29, township No. 1 north of range No. 6 M. D. M., containing 46 acres and 26 hundredths. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

That on, to wit, the said 1st day of February, A. D. 1891, and while this plaintiff was so possessed and entitled to the possession of said land and premises, the said defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except that portion thereof bounded and described as follows, to wit: Beginning at the post marked 'C. M. P. 180'; thence running due north 245 chains to post marked 'C. M. P. 181'; thence north 9 degrees east to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwesterly along said fence to the said creek; thence descending said creek to the point of beginning), and ever since have wrongfully and unlawfully withheld, and still withhold the possession thereof from this plaintiff, to his damage in the sum of five hundred dollars ($500).

That the value of the rents and profits of the said land and premises while this plaintiff has been excluded therefrom is the sum of fifteen hundred dollars ($1,500).

During the time that defendants have excluded the plaintiff from said land and premises the said defendants have assumed the right to lease, and have let various parties into the possession of portions of said land, and have been exacting from and receiving from such parties large sums of money claimed by said defendants as rental of the portions of land severally occupied by them, such sums amounting in all, as plaintiff is informed and believes, to at least fourteen hundred and fifty dollars, which should have been paid to the plaintiff; and that said defendants are continuing to collect from various parties now in such occupancy large sums of money claimed by said defendants under such unlawful pretense, and threaten to continue to do so; that said parties are numerous, are unknown to the plaintiff, and are frequently changing; that said defendant Peter Gardner is insolvent; that said defendants are conspiring together to defraud this plaintiff out of the rents and profits of said land, and to that end are endeavoring to mislead this plaintiff as to which of said defendants is receiving said sums of money, and plaintiff does not know and cannot ascertain the facts in relation thereto, so that it is impossible for this plaintiff to obtain adequate relief in an action at law; that defendants have cut and carried away a large quantity of valuable timber growing upon said land, and threaten to and will, unless restrained by this Honorable Court, continue to cut and

carry away valuable timber therefrom; that there is upon said land so unlawfully occupied by the defendants a building of great value, the property of this plaintiff, which said building this plaintiff believes, and therefore charges, that the said defendants design and intend to either destroy or remove from said land, to the great damage of plaintiff.

And plaintiff avers, that the acts hereinbefore complained of are continuous, and that their continuance during the litigation of this action, and the cutting and carrying away timber from said land, and the destruction or removal of said or any building from said land, or either the continuance of said acts or said cutting of timber or said destruction or removal, would produce great injury to the plaintiff, for which he is remediless at law.

Wherefore, plaintiff prays judgment for the restitution of said land and premises, for the sum of five hundred dollars damages for the withholding thereof; and for damages estimated at the rate of fifty dollars per month, the value of the rents and profits of said land and premises, from the 1st day of February, 1891, until the day of the judgment to be entered herein, together with costs of suit; that until the further order of this Court the said defendants, and each of them, their and each of their servants, agents, attorneys, employees, and all persons acting under the control, authority, or direction of them, or either of them, or claiming or to claim by, through, or under them, or either of them, be enjoined and commanded to absolutely refrain from and desist from leasing to or letting any person or persons into possession of any portion of said land and premises, and from receiving from any person or persons any sum of money whatever in consideration of the occupancy of any portion of said land and premises; and from cutting or interfering with any timber growing upon said land; and from destroying or removing from said land any building or structure whatever, and from interfering in any manner with said land and premises, or any portion thereof; and for such other or further relief as may be just and equitable.

TAYLOR & CRAIG,
Attorneys for Plaintiff."

(Duly verified).

The answer, cross-complaint, and answer thereto of defendant in error are as follows:—

Answer.

I.

[Title of Court and Cause.]

"Now come the defendants, Peter Gardner and Jacob Gardner, and for answer to the first count of the Complaint on file in the above-entitled action.

Deny that on the 1st day of February, 1891, or any other time, the plaintiff was or for a long or any time prior thereto, had been the owner of, or in the possession of, or entitled to the possession of, or from thence hitherto, or from any period of time or ever, has been the owner of or entitled to the possession of the land described in said Complaint or any part thereof, or any of the tenements, hereditaments, or appurtenances thereunto belonging, or in anywise appertaining, except that plaintiff was on said day, and since that time has been in the possession of so much of the said land described in said Complaint, as is described as follows:—

'A.' Beginning at a post marked "C. M. P. 180," running thence due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the said creek, thence descending the said creek to the point of beginning.

'B.' Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of the said Blythedale road, running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of said rancho, thence along said fence north 8 degrees 10 minutes west 514 5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle south 8 degrees 30 minutes west 277 5-10 feet, south 16 degrees 55 minutes west 143 7-10 feet, south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.

2d. And defendants deny that on the 1st day of February, 1891, or while the plaintiff was possessed or entitled to the possession of said land or premises or any part thereof, except the said portion thereof hereinbefore described, the defendants without right or title, or wrongfully, or unlawfully, or otherwise, or at all entered into or upon the said land or ousted or ejected the plaintiff from the same, or any part thereof, or that they ever entered at all

into or upon any part of said excepted parcels of said land, or that said defendants, or either of them, have ever since wrongfully, or unlawfully, withheld the possession of any of said land from the plaintiff, or that the defendants ever ousted or ejected the plaintiff from any part of said excepted parcels of said land, or that defendants or either of them, have ever wrongfully or unlawfully, or otherwise or at all, withheld, or still, or now withhold the possession or any part of said excepted parcels of land hereinbefore described, from the plaintiff, or that the plaintiff has ever been damaged by any withholding by defendants of said land from him in the sum of $500.00 or any other sum of money, but on the contrary these defendants aver that the defendant, Jacob Gardner, and his predecessors in estate, were at the date of the commencement of this action, and for more than forty years next prior thereto, had been and still are the owners of and in the open, actual, and adverse possession of all of the lands described in said Complaint, except so much thereof as is hereinbefore described, and that the defendant, Peter Gardner, has for more than two years last been upon the said premises under and in subordination to the said Jacob Gardner and his title.

3d. And defendants deny that the value of the rents and profits of said land and premises described in said Complaint during the time it is alleged that plaintiff has been excluded therefrom, is the sum of $1500.00, or any other sum greater than $100.00.

Deny that the reasonable monthly value or any monthly value of the rents and profits of the lands and premises or the lands or premises described in the Complaint is or ever was about $50.00 per month or any value per month greater than $10.00 per month, or that by reason of the unlawful withholding or any withholding of said land and premises, or said land or premises, by defendants, or either of them, plaintiff has been deprived, or by the continuance thereof will be deprived of the use and occupation of the same to his loss and damage in the sum of $50.00-100 per month or any sum of money greater than $10.00-100 per month.

II.

And defendants, for answer to the second count of said complaint.

1st. Deny that on the 1st day of February, 1891, or at any other time prior thereto, had been the owner of or in the possession of, or entitled to the possession of, or from thence hitherto, or from any period of time, or ever has been the owner of, or entitled to the possession of the land described in said complaint or any part

thereof, or any of the tenements, hereditaments, or appurtenances thereunto belonging, or in anywise appertaining, except that plaintiff was on said day, and since that time has been in the possession of so much of the said land described in said complaint as is described as follows:—

A. Beginning at the post marked "C. M. P. 180," thence running due north 2.45 chains to post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale Road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the said creek, thence descending said creek to the point of beginning.

B. Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio, with the northerly line of said Blythedale Road, running thence N. 9 deg. E. along said line of said rancho to a fence which runs N. 8. deg. 10 min. W. from the said line of said rancho, thence along said fence N. 8. deg. 10 min. W. 514.5-10 feet, N. 14 deg. 30 min. W. 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle S. 8 deg. 30 min. W. 277.5-10 feet, S. 16 deg. 55 min. W. 143.7-10 feet, S. 22 deg. 11 min. W. to the said northerly line of said Blythedale Road; thence southeasterly along the said northerly line of said road to the place of beginning.

2d. And defendants deny that on the 1st day of February, 1891, or while the plaintiff was possessed or entitled to the possession of said land or premises or any part thereof, except the said portions thereof hereinbefore described, the defendants without right, or title, wrongfully, or unlawfully, or otherwise or at all, entered into or upon the said land, or ousted or ejected the plaintiff from the same, or any part thereof, or that they ever entered at all into or upon any part of said excepted parcels of said land or that said defendants or either of them, have ever since wrongfully or unlawfully withheld possession of any of said land from the plaintiff, or that the defendants ever ousted or ejected the plaintiff from any part of said excepted parcels of said land, or that defendants or either of them have ever, wrongfully, or unlawfully, or otherwise or at all, withheld or still or now, withhold the possession of any part of said excepted parcels of land hereinbefore described from the plaintiff, or that the plaintiff has ever been damaged by any withholding by defendants of said land from him, in the sum of $500,00 or any other sum of money, but on the contrary these defendants aver that the defendant, Jacob Gardner, and his pre-

decessors in estate, were at the date of the commencement of this action, and for more than forty years next prior thereto, had been and still are the owners of and in the open actual and adverse possession of all of the lands described in said complaint, except so much thereof as is hereinbefore described, and that the defendant Peter Gardner has for more than two years last past been upon said premises under and in subordination to the said Jacob Gardner and his title.

3rd. And defendants deny that the value of the rents and profits of said land and premises described in said complaint, during the time it is alleged that the plaintiff has been excluded therefrom, is the sum of $1500.00 or any other sum greater than $100.00.

4th. Defendants deny that the sums received by them or either of them, as rents of the said land during the period during which it is alleged in said complaint that the plaintiff was excluded therefrom by defendants, amount to the sum of $1450.00 or any sum greater than $550.00.

5th. And defendants deny that they are continuing to collect from various or any parties now in the occupancy of said land, large sums of money, or any sums of money claimed by defendants under any unlawful pretense, and they aver that the sums of money being collected by them, are small sums which they have a right to collect and are rightfully collecting. And deny that the parties from whom defendants are collecting such moneys are numerous or unknown to the plaintiff.

6th. And defendants deny that they or either of them are conspiring together to defraud the plaintiff out of the rents or profits of said land, or to that end or otherwise or at all, are endeavoring to mislead the plaintiff as to which of said defendants is receiving said sums of money, or that plaintiff does not know or cannot ascertain the facts in relation thereto, or that it is impossible for plaintiff to obtain adequate relief in an action at law, and deny that defendants or either of them have cut or carried away a large quantity or any quantity of valuable timber, or any kind of timber growing upon said land described in said complaint, or which ever grew thereon, or that they threaten to, or will unless restrained by this Court, continue to cut or carry away, valuable timber or any timber therefrom, or that there is upon said land occupied by the defendants, a building of great value, or any building which is the property of the plaintiff, and deny that the defendants design or intend, or ever designed or intended to destroy, or remove from the land mentioned and described in said complaint, the building mentioned in said complaint.

7th. And defendants deny that the acts or any act complained of in the second count of plaintiff's complaint, are continuous, or that they were ever committed at all, and deny that the continuance of any act or acts complained of in said complaint during the litigation of this action, or the cutting or carrying away of any timber from said land, or the destruction or removal of said or any building from said land, or either the continuance of said acts, or said cutting of timber, or said destruction or removal would produce great or any injury to the plaintiff, or for which he is remediless at law, and defendants most emphatically deny, that they intend to cut or carry away any timber from said land, or to destroy or remove from said land any building thereon.

8th. And for a further and separate defense to both of the causes of action for damages alleged in plaintiff's complaint:

The defendants allege that during the period during which said defendants have been in possession of the land described in said complaint except the said excepted portions of said land hereinbefore described, the defendants made and erected on the said lands outside of said excepted portions, permanent improvements, consisting of a house and fencing of the value of $2000.00 and that said defendants were at the time of the erection of said improvements, holding said lands under color of title adversely to the claim of the plaintiff in good faith.

Wherefore defendants pray judgment that plaintiff take nothing by this action, and that defendants have and recover from plaintiff their costs, and that they have such other and further relief as may be just and equitable.

HEPBURN WILKINS,
Attorney for Defendants."

(Duly verified.)

Cross-Complaint of Jacob Gardner.

[Title of Court and Cause.]

Now comes the defendant, Jacob Gardner, and by leave of the Court, first had and obtained, files this his cross-complaint against the plaintiff in the above-entitled action, and for cross-complaint against the plaintiff, alleges:—

1st. That on or about the second day of October, 1834, Jose

Figueroa, as the Governor of California, under the Government of Mexico, granted to one Juan Reed, a certain tract of land situated in the State of California, and in what afterwards became the County of Marin, being the tract of land known as and called the Rancho Corte Madera del Presidio.

2d. Defendant avers on his information and belief that the said rancho granted as aforesaid, included within its exterior limits the land hereinafter mentioned, which was conveyed by the deed hereinafter mentioned, from T. B. Deffebach et al. to Julius C. McCeney, dated February 14, 1871.

3d. That in the year 1843, Juan Reed died intestate in the said State of California, leaving surviving him four children, to wit: his son, John J. Reed, his daughter, Maria Inez Reed, who afterwards intermarried with one Thomas B. Deffebach, and thereafter bore the name of Deffebach, his daughter, Hilarita Reed, also known as Hilaria Reed and as Hilaria M. Reed, and his son, Ricardo Reed, which children were the only heirs at law of said Juan Reed, and that the said Ricardo Reed died in the year 1853, intestate, and under twenty-one years of age, leaving the said other children of said Juan Reed his only heirs at law.

4th. That on or about the 12th day of June, 1854, the Board of Land Commissioners for the State of California, made and entered a judgment and order confirming the said grant. That thereafter an appeal was taken from the judgment or order aforesaid of the said Board of Land Commissioners, to the District Court of the United States, in and for the District of California: That thereafter, on the 14th day of January, 1856, a judgment and decree was duly made and entered in the said District Court, whereby it was adjudged that the claim of the appellees who were the said heirs of said Juan Reed, was a good and valid claim, and that the said claim be and the same was thereby confirmed to the extent and quantity of one square league, being the same land described in the said grant, and of which possession was proved to have been long enjoyed, provided that the said quantity of one square league then confirmed, be contained within the boundaries called for in the said grant, and the map to which the grant refers, and if there should be less than that quantity within said boundaries, then that the Court confirmed to the claimants, that less quantity.

5th. That in the year 1858, a survey of the said Mexican grant was made by the United States Deputy Surveyor, R. C. Mathewson, generally known as the "Mathewson survey," and the defend-

ant avers on his information and belief, that the land described in the said deed from T. B. Deffebach et al. to Julius C. McCeney, was outside of the exterior boundaries of Mathewson survey, and within the exterior boundaries of said Mexican grant. That the said Mathewson survey never became final, and that thereafter, in the year 1872, the said Mathewson survey was set aside by the authorities of United States, and a new survey ordered by said authorities.

6th. The defendant avers on his information and belief that thereafter, in the months of November and December, 1873, and June, 1874, a re-survey was made by the authorities of the United States, of the lands embraced by the said Mexican grant, and that said last-mentioned survey of said Mexican grant became the final survey and official survey thereof.

7th. That on or about the 25th day of February, 1885, a patent was issued by the United States to the said John J. Reed, Maria Inez Reed, and Hilarita Reed, for the said Mexican grant of land as surveyed by the survey last-mentioned, and that by the said last-mentioned survey and the said patent, the land described in the said deed from said T. B. Deffebach et al. to said Julius C. McCeney, was excluded.

8th. That on or about the 12th day of August, 1865, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach, and T. B. Deffebach, her husband, made, executed, and delivered for a valuable consideration, to J. Clinton Bolton, a deed, whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in the said Mathewson survey.

9th. That on or about the 16th day of September, 1865, said Bolton made, executed, and delivered to R. Steinback all the undivided one-fourth part of all the said Mexican grant which was not included in said Mathewson survey.

10th. That on or about the 28th day of March, 1866, said R. Steinback made, executed, and delivered to Emil Steinback a deed whereby he conveyed to said Emil Steinback the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

11th. That on or about the 16th day of June, 1866, said Emil Steinback made, executed, and delivered to Emil Grisar a deed whereby he conveyed to said Grisar the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

12th. That on the 19th day of June, 1866, the said Emil Grisar made, executed, and delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

13th. That on or about the 26th day of July, 1868, the said J. Clinton Bolton made, executed, and delivered to T. B. Valentine a deed whereby he conveyed to said Valentine all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

14th. That on or about the 11th day of May, 1869, John J. Reed made, executed, and delivered to Hugh A. Boyle a deed whereby he conveyed to said Boyle all the undivided one-sixth part of all the said Mexican grant which was not included in the said Mathewson survey.

15th. That on or about the 24th day of May, 1869, the said Hilarita Reed made, executed, and delivered to said Hugh A. Boyle a deed whereby she conveyed to the said Boyle all the undivided one-sixth part of the said Mexican grant which was not included in the said Mathewson survey.

16th. That on or about the 1st day of February, 1871, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine, and H. C. Newhall made, executed, and delivered to Julius C. McCeney a deed whereby they conveyed to said McCeney all that certain tract of land situated in the County of Marin, State of California, bounded and described as follows, to wit:—

Beginning at a post marked "C. M. P. 181," distant 20 chains north of corner sections 28, 29, 32, and 33, in township one north, range six west, Mount Diablo meridian, from which a madrona tree, four feet in diameter, marked "B. J. C. M. P. 181," bears south 24 deg. east 87 links distant, said post is station 181 on R. C. Mathewson's survey of the Rancho "Corte Madera del Presidio," as approved by the United States Surveyor General of the State of California, September 19, 1859; thence along the line of said Mathewson's survey E. 6.38 chs. to station, a post in stone mound from which an oak tree, 22 inches in diameter, bears N. 17½ deg. W. 33 chs. and said madrona tree bears S. 82½ deg. W.; thence leaving said Mathewson's survey, N. 9 deg. W. 29.90 chs. to station; thence N. 70¾ deg. W. 10.70 chs. to station post marked "A;" thence S. 73¾ deg. W. 16.65 chs. to station in center of the creek, known as the "Arroyo de Corte Madera del Presidio;" thence

down the center of said creek, with the meanders thereof, according to William J. Lewis' survey of the Rancho Saucelito, approved October 2, 1860, by the said Surveyor General, S. 39.¾ deg. E. 150 chs. to station 11 of said Lewis' survey; thence S. 4½ deg. E. 10.74 chs. to station 12 of said Lewis' survey; thence S. 17 deg. E. 8.50 chs. to station 13 of said Lewis' survey; thence S. 35 deg. E. 10.30 chs. to station 14 of said Lewis' survey; thence S. 71¼ deg. E. 10.78 chs. to station 15 of said Lewis survey; thence N. 70¾ deg. E. 3.90. chs. to station 16 of said Lewis' survey; thence S. 33¾ deg. E. 0.40 chs. to station in center of said Arroyo, and on line between sections 28 and 29, township one north, range six west, 17.55 chs. north of corner sections 28, 29, 32, and 33; thence leaving said creek and survey, N. 2.45 chs. to the post marked "C. M. P. 181," the place of beginning. Containing 80.24-100 acres of land.

17th. That on or about the 19th day of January, 1875, the said Julius C. McCeney made, executed, and delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all of the land described in said deed of February 1, 1871, from said T. B. Deffebach et al. to said McCeney.

18th. Defendant avers on his information and belief, that each and all of the grantees named in the deeds aforesaid purchased the lands and interests therein which the said deeds purported to convey in good faith and for a valuable consideration, and that the said grantees used, improved and continued in the actual possession of the said lands, including lot 3 in section 28 and lot 3 in section 29, in township one north, range six west, according to United States Government surveys according to the lines of their original purchases, and that said lands were so used and improved as tenants in common by the said various grantees, until the 14th day of February 1871, on which day, the various tenants in common except said Throckmorton, made the conveyance aforesaid to said Julius C. McCeney, and that said conveyance was made to said McCeney, in trust for said Throckmorton, and in order to segregate the interest of said Throckmorton in said lands and convey the same in severalty to said Throckmorton, and in pursuance of said trust, the said McCeney, made, executed and delivered the said deed of January 19, 1875, to said Throckmorton, and that ever since the said 1st day of February, 1871, up to the date of the deed to defendant, Jacob Gardner, hereinafter mentioned, the said Throckmorton and the executrix of his will after his death, used and improved, and continued in the actual possession of the land described in the said deed of February 1, 1871, to said McCeney, and the deed of Jan-

uary 19, 1875, to said Throckmorton, substantially according to the lines of said deeds, and that said Throckmorton, and all said other grantees at the dates of said several purchasers, believed in good faith that all of the lands conveyed by said deeds as aforesaid, were included within the said Mexican grant to the said Juan Reed, and that the said Throckmorton, in good faith, entertained such belief until the date of his death, and that the said Mexican grant aforesaid, did purport to grant and convey all of the said lands described in the said deeds to the said McCeney and the said Throckmorton.

19th. That on or about the 19th day of January, 1875, the said Throckmorton, as a bona fide purchaser from Mexican grantees, made an application to the register and receiver of the United States Land Office at San Francisco, under Sec. 7 of the Act of the Congress of the United States, entitled "An Act to quiet titles in California," approved July 23, 1866, basing his application upon the facts hereinbefore set forth, and that the said Ebenezer Wormouth was a party defendant upon the said application of said Throckmorton in said land office, and claimed the said land as a pre-emptor, and contested said application.

20th. And defendant avers on his information and belief, that evidence was introduced in the matter of the application and contest aforesaid, showing without conflict, that all the facts hereinbefore set forth were true, and establishing all of said facts by competent evidence, but, that notwithstanding the said evidence which was given as aforesaid in said United States Land Office in San Francisco upon the said contest, and, notwithstanding that there was no conflict in said evidence, and no evidence whatever on said contest which contradicted the said evidence or any part thereof, and that the said evidence was true, the register and receiver of the land office at San Francisco, on or about the 9th day of February, 1886, basing their decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced before them on said application as aforesaid, the said Throckmorton, was not in law or under the law entitled to purchase the said land, denied the application of said Throckmorton to purchase the said land, and that on appeal from the said decision to the commissioner of the General Land Office of the United States, on the proofs taken before the said register and receiver, the said commissioner, on or about the 18th day of June, 1890, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as

aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, affirmed the said decision of said register and receiver, and that on appeal from said decision of said commissioner, the Secretary of the Interior of the United States, on or about the 24th day of October, 1891, on the same proofs, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as aforesaid, the said Throckmorton, was not in law or under the law entitled to purchase the said land, affirmed the said decision of the said commissioner, denying the application of said Throckmorton, to purchase said land under said act.

21st. That thereafter, upon the return of the instructions of the Superior officers on said appeals to the United States Land Office at San Francisco, the Register and Receiver of the said land office, on or about the 20th day of July, 1892, notwithstanding the application of the said Throckmorton, and notwithstanding the fact that the said Throckmorton was entitled to purchase the said land under the said Act of Congress, did contrary to law, and basing their action on the erroneous construction of the law applicable to the case before them, and against the protest and objection of the representatives of said Throckmorton, allow the said plaintiff, Wormouth, to make proof and payment for the said land described in said deed to said Throckmorton, and issued to the said Wormouth, a certificate of purchase for the said land as a commuted homestead entry.

22d. That thereafter, on the 14th day of August, 1893, under and in pursuance of the said certificate of purchase and the rulings aforesaid of said officers of the said Land Department of the United States, a patent was issued by the President of the United States to the said plaintiff, Ebenezer Wormouth, purporting to convey to him the lands described in the said deed to said Throckmorton.

23d. That on or about the 28th day of May, 1883, the said Samuel R. Throckmorton, died in the City and County of San Francisco, State of California, leaving a will by which he bequeathed to his daughter, Susanna M. Throckmorton, all his property and estate.

24th. That on or about the 27th day of June, 1883, an order was duly given and made in and by the Superior Court of the City and County of San Francisco, State of California, whereby the said Susanna M. Throckmorton, who was named in said will as

the executrix thereof, was duly appointed as such executrix, and whereby letters testamentary were duly ordered to be issued to her.

25th. That thereafter, on the 27th day of June, 1883, letters testamentary upon the estate of said decedent, were duly issued to the said Susanna M. Throckmorton, who then was and up to the date of the distribution of the estate of said decedent, continued to be the duly appointed, qualified and acting executrix of the will of said decedent.

26th. That on or about the 23d day of September, 1889, an order and decree was duly given and made in and by said Superior Court of said City and County, whereby the whole estate, real and personal, of said decedent, was distributed to the said Susanna M. Throckmorton.

27th. That on or about the 17th day of July, 1890, the said Susanna M. Throckmorton, made, executed and delivered to the defendant, Jacob Gardner, a deed, whereby she conveyed to the said defendant, Gardner, all those certain parcels of land situate, lying and being in the County of Marin, State of California, and described as follows, to wit :—

Lot 3 of section 28 and lot 3 of section 29, township one north, range six west, Mt. Diablo base and meridian. Containing 43 acres of land more or less. Being a part of the property conveyed by and described in said deed from Julius C. McCeney to Samuel R. Throckmorton.

28th. That on the said 17th day of July, 1890, defendant, Jacob Gardner, entered under the said last-mentioned deed into the possession, and has thence hitherto remained in the possession of the land conveyed by and described in the said deed, except so much thereof as is described as follows, to wit :—

Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chs. to a post marked "C. M. P. 181"; thence north 9 deg. east to a road known as the Blythedale road ; thence northwesterly along said road about 10 chs. to a fence; thence southwesterly along said fence to the creek on the easterly boundary line of the Rancho Saucelito ; thence descending the said creek to the point of beginning.

That the defendant, Jacob Gardner, was always prevented by the plaintiff from entering into the possession of said excepted parcel.

29th. And defendant, Jacob Gardner, avers that he is the owner in equity of the said land described in the said deed from Susanna

M. Throckmorton to him, and that the legal title to said land, which is included in said patent from the United States to said Ebenezer Wormouth, is held in trust by the said plaintiff, Wormouth, for the defendant, Jacob Gardner.

Wherefore, defendant prays for a judgment of this Court that the land described in the said deed from Susanna M. Throckmorton to the defendant, Jacob Gardner, and the title thereof conveyed by the patent from the United States to the plaintiff, issued on the 14th day of August, 1893, is held by the plaintiff in trust for the defendant Jacob Gardner, and that the said plaintiff be commanded and required to execute, acknowledge and deliver to the defendant, Jaco Gardner, a deed conveying to him all the said lands described in the said deed from said Susanna M. Throckmorton, and including the land described in said Complaint, and that the defendant, Jacob Gardner, have such other and further relief as may be just and equitable, together with the costs of this action.

HEPBURN WILKINS,
Attorney for Defendant, Jacob Gardner.

(Duly verified.)

Answer to Cross-Complaint.

Title of Court and Cause].

The above-named plaintiff, Ebenezer Wormouth, answers the cross-complaint filed against him by the above-named defendant, Jacob Gardner, in the above-entitled action, as follows:—

1. This plaintiff, in answer to the second paragraph of said cross-complaint, denies that the rancho granted by the Governor of California, under the Government of Mexico, to Juan Reed, included within its exterior limits the land described in the deed from T. B. Deffebach et al. to Julius C. McCeney, of February 14, 1871, or any part thereof, except so much thereof as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al. Denies that the grant mentioned in the first paragraph of said cross-complaint included any part of the land in controversy in this action. Denies that any grant ever made by the Mexican Government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

2. Answering the 5th paragraph of said cross-complaint, this plaintiff denies that the land described in said deed of T. B. Deffe-

bach et al. to Julius C. McCeney, or any part thereof, except as in this answer hereinbefore set forth, was within the exterior boundaries of said Mexican grant.

3. Answering the 8th paragraph of said cross-compiaint, this plaintiff denies that on the 12th day of August, 1865, or at any other time, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach, and T. B. Deffebach, her husband, or any of them, made, executed, or delivered for a valuable or any consideration, except as hereinafter stated, to J. Clinton Bolton a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in said Matthewson survey, but plaintiff avers that the only consideration which passed from said Bolton to the said grantors was an agreement by said Bolton to give his services as an attorney before the U. S. Courts and authorities to procure a patent for more land than was included in said Matthewson survey, or if no more land was patented, to procure such patent for the land included in the Matthewson survey.

4. In answer to the 16th paragraph of said cross-complaint, plaintiff denies that on or about the first day of February, 1871, or on any other day, month, or year, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine, and H. C. Newhall made, executed, or delivered to Julius C. McCeney a deed whereby they conveyed all that certain tract of land situated in the County of Marin, State of California, bounded and described as set forth in said paragraph 16 of said cross-complaint, or any part of said land, save and except a small part thereof which lies within the boundaries of the patent for said land which was issued to the said Reed heirs on the 25th of February, 1885, which said excepted portion of said land lies without the boundary of the land described in plaintiff's complaint in this action; and in that behalf this plaintiff avers that neither the said T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine, nor H. C. Newhall did, on or about the first day of February, 1871, or at any other time, own or was entitled to own or entitled to convey to any one any of the land described in said 16th paragraph of said cross-complaint, save and except that part thereof lying within the bounds of said Reed patent.

5. Answering the 17th paragraph of said cross-complaint, plaintiff denies that on or about the 19th day of January, 1875, or at any other time, the said Julius C. McCeney made, executed or delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all of the land described in said deed of Feb'y 1st

1871, from said T. B. Deffebach et als. to said McCeney, or conveyed any part of said land to said Throckmorton save and except that portion thereof lying within the boundary of said Reed patent; and in that behalf this plaintiff further answering the 17th paragraph of said cross-complaint denies that said Julius C. McCeney did, on or about the 19th day of January, 1875, or at any other time, or at all, own, or was entitled to own, or was seized or possessed or was entitled to convey to any one any of the land mentioned and described in the said deed from said McCeney to said Throckmorton, save and except that portion which lies within the boundary of said Reed patent, no part of which excepted portion lies within the boundary of the land mentioned and described in Plaintiff's Complaint in this action.

6th. Answering the 18th paragraph of said cross-complaint, this plaintiff denies that each, or all, or any, of the grantees named in the deeds mentioned or referred to in said 18th paragraph of said cross-complaint, purchased, or pretended to purchase, the lands or interests described or mentioned in said deeds, in good faith, or for a valuable consideration; denies that said grantees or any grantee named in said cross-complaint used or improved or continued in the actual possession of said lands, according to the lines of their original purchases or ever used, improved or possessed any part thereof, except as trespassers upon the possession and rights of this plaintiff, as alleged in his complaint in this action; denies that lot 3 in section 28 and lot 3 in section 29, township one north range 6 west, were possessed or used or improved by any of the persons named as grantees in said cross-complaint as tenants in common or at all used by any of said persons, except as trespassers as aforesaid, and denies that any part of said lot 3, in section 28, or of said lot 3, in section 29, was ever in the possession of the original purchaser, Bolton, or any of his grantees or successors in interest, until on or about the 1st day of October, 1872, when an attempt was made by said Throckmorten to inclose a portion of the public lands of the U. S. lying to the west of the western boundary of the Rancho Corte de Madera del Presidio, whereupon, to-wit: on or about said 1st day of October, 1872, the plaintiff gave notice to said McCeney and said Throckmorton that the lands they were attempting to inclose or fence were owned and claimed by plaintiff. Denies that said deed to McCeney was made in order to segregate the interest, or any interest, of said Throckmorton. Denies that said Throckmorton or his executrix ever had any right to use or to improve any part of said lot 3 in section 28 or

of said lot 3 in section 29; denies that said Throckmorton or his said executrix was ever in the actual possession of the same or any part thereof except as intruders and trespassers upon the rights and possession of this plaintiff, and particularly deny that said defendants, or either of them, or any of their, or either of their, grantees or predecessors in interest ever were in the possession of the parcels designated respectively "A" and "B" in defendant's answer herein; denies that all, or any, of said grantees, particularly and specially said Throckmorton, believed in good faith, or at all believed, that all of the lands conveyed by said deeds, or any part or parcels of said lot 3 in section 28 and said lot 3 in section 29, were included within said Mexican grant, or that said Throckmorton in good faith, or at all, entertained any such belief; and denies that said Mexican grant did purport to grant or convey all or any part of the lands now in lots 3 in section 28 and lot 3 in section 29.

7. Answering the 19th paragraph of said cross-complaint, this plaintiff denies that on or about the 19th day of January, 1875, or at any other time prior to October 20th, 1880, said Throckmorton made any application to the register and receiver, or either of them, to purchase said lands, and plaintiff denies that on said 20th day of October, 1880, or on said 19th day of January, 1875, or at any other time, the said Throckmorton, as a bona fide purchaser from Mexican grantees made an application to the register and receiver of the U. S. Land Office at San Francisco, under section 7 of the Act of Congress of the United States, entitled "An Act to Quiet Titles in California," approved July 23, 1866, or basing his application upon the facts in said cross-complaint hereinbefore alleged, and denies that said Ebenezer Wormouth claimed the said land on the hearing of said contest before said register and receiver as a pre-emptor, but on the contrary claimed the said land as a homestead claimant and offered proof of his entry and right as such homestead claimant.

7½. Answering the 20th paragraph of said Cross-Complaint this plaintiff denies that the evidence introduced in the matter of the application and contest mentioned in 19th paragraph of said Cross-Complaint showed without conflict or showed at all that all the facts set forth in the preceding paragraphs of said Cross-Complaint were true, or that any of such facts which are in this answer denied or were true; denies that the evidence introduced in the matter of said application and contest established all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; denies

that there was no conflict in said evidence; denies that there was no evidence whatever on said contest which contradicted Throckmorton's evidence or any part thereof; denies that said alleged evidence was true; denies that the Register and Receiver of the land office in San Francisco, or either of them, on or about the 9th day of February, 1886, or at any other time based their, or his decision upon said alleged evidence or upon evidence without conflict; denies that said Register and Receiver, or either of them, rested their or his decision upon the proposition or upon a proposition of law that the said Throckmorton was not in law, or under the law entitled to purchase the said land; denies that the Commissioner of the General Land Office, on appeal from the decision of the Register and Receiver, basing his decision upon evidence without conflict, or resting his decision upon the, or upon a proposition of law, decided that said Throckmorton was not in law entitled to purchase said land; denies that the Secretary of the Interior based his decision upon evidence without conflict; denies that the said Secretary of the Interior rested his decision, affirming the decision of the Commissioner of the General Land Office upon the or upon a proposition of law; denies that said Throckmorton was a bona fide purchaser from the Mexican grantees of the lands described in paragraph 16 of said Cross-Complaint.

8. Denies that said Throckmorton as a bona fide purchaser from the Mexican grantees made the application to the Register and Receiver of the United States Land Office at San Francisco under Section 7 of the Act of Congress entitled, "An Act to quiet titles in California"; denies that said Throckmorton was entitled to purchase said land, or any part thereof under said Act of Congress; denies that the Register and Receiver of the Land Office at San Francisco did contrary to law; or did, basing their decision on an erroneous construction of the law applicable to the case before them, allow this plaintiff to make proof and payment for said land.

9. This plaintiff in answer to the matters alleged in paragraph 27 of said Cross-Complaint denies that on or about the 17th day of July, 1890, or at all, the said Susanna Throckmorton made, executed, or delivered to the defendant, Jacob Gardner, a deed whereby she conveyed to said defendant, Gardner, all those certain parcels of land described as lot 3 of Section 28, and lot 3 of Section 29, Township 1 North, Range six West, Mt. Diablo Base and Meridian. And in that behalf this plaintiff avers that said Susanna Throckmorton was not the owner of said land when she executed said alleged deed nor was she entitled to convey the same to said Gardner.

10. This plaintiff denies that on the 17th day of July, 1890, or at any other time, the defendant, Jacob Gardner, entered into the possession of said land under said deed from said Susanna M. Throckmorton, and denies that he has ever since remained in possession of said land except as an intruder and trespasser upon the possession of this plaintiff, and further denies that said defendant, Jacob Gardner, ever entered into the actual or other possession of any part of the lands described respectively as "A" and "B" in the defendant's answer herein.

11. This plaintiff denies that said Jacob Gardner is, or ever was, the owner in equity of said land or of any part of the land described in plaintiff's complaint in this action, and in the United States patent issued to him on the 14th day of August, 1893, as alleged in the 22d paragraph of said Cross-Complaint; denies that this plaintiff holds said land or part thereof in trust, or otherwise or at all for the defendant, Jacob Gardner.

Wherefore plaintiff prays that defendant, Jacob Gardner, take nothing by his said Cross-Complaint, that the same be dismissed, and that plaintiff have judgment as prayed in his complaint herein.

E. B. MAHON, AND
L. D. McKISICK,
Attorneys for Plaintiff.

(Duly Verified.)

The action came on regularly for trial before the Court, certain issues as to damages for use and occupation having been submitted to a jury.

Evidence was produced by both sides, and thereafter, and on March 8, 1897, the Court made its decision in writing, the findings of fact and conclusions of law being separately stated, said decision being as follows:—

Findings of Fact and Conclusions of Law.

[Title of Court and Cause.]

"This cause came on regularly for trial, without a jury, as to the issues raised and joined by the answer of the plaintiff to the cross-complaint of the defendant, Jacob Gardner, herein, and the like issues raised by the supplemental answer of said Peter Gardner and said Jacob Gardner, on file herein, a jury trial as to said issues having been duly waived. The plaintiff appeared by Messrs. E. B. Mahon and L. D. McKisick, his attorneys, and the defendants appeared by H. Wilkins, Esq., their attorney.

Evidence was introduced on behalf of the respective parties, and the case was duly argued and submitted, and by the Court taken under advisement, and the Court, being now fully advised, finds the following facts:—

1st. That on the 20th of October, A. D., 1880, S. R. Throckmorton, defendant Jacob Gardner's predecessor in interest, filed an application in the office of the Register and Receiver of the United States Land Office, at San Francisco, California, to purchase lot 3, in section 28, and lots 2 and 3 and S. E. ¼ of N. E. ¼ section 29, township 1 north, range 6 west, Mt. Diablo Meridian, under the 7th section of the Act of Congress of the United States, entitled "An Act to quiet Land Titles in California," approved July 23, 1866.

That the plaintiff, Ebenezer Wormouth, was a party defendant upon said application of said Throckmorton in said Land Office, and on the hearing thereof claimed the said lot 3 in section 28, and said lots 2 and 3 in section 29, as a homestead claimant, and contested said application of Throckmorton.

2d. That one of the questions decided by the United States Register and Receiver, and confirmed by the United States Commissioner of the General Land Office, and by the United States Secretary of the Interior in the said contest of *Throckmorton* v. *Wormouth*, mentioned in the 20th paragraph of said cross-complaint herein, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed.

3d. That the officers of the United States Land Department, to wit, the Register and Receiver, the Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact upon the evidence produced before said Register and Receiver on said contest, that the land in controversy in this action was not included in the said original grant by the Mexican Government to Juan Reed.

4th. That a survey known as the Matthewson survey of said Rancho Corte de Madera del Presidio (commonly called the Reed Ranch) mentioned in the 1st paragraph of said cross-complaint, was made by authority of the United States, about seven years before the date of the deed of August 12, 1865, from John J. Reed and others to J. Clinton Bolton, under whom defendant, Jacob Gardner, deraigns title, being the deed mentioned in the 8th paragraph of said cross-complaint. That said survey excluded the lands in controversy, and no survey of the said Rancho Corte de Madera del Presidio ever made by authority of the United States included the lands in controversy.

5th. That the consideration paid by said Bolton to the Reed heirs (John J. Reed and others) for the said deed to him of 1865 was not a money consideration, that the only consideration which passed from said Bolton to the said grantors was an agreement by said Bolton to give his services as an attorney before the United States Courts and authorities to procure a patent for more land than was included in said Matthewson survey, or if no more land was patented, to procure such patent for the land included in the Matthewson survey.

6th. That the officers of the United States Land Department, to wit, the United States Register and Receiver, the Commissioner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of "*Throckmorton* v. *Wormouth*," in denying said application of Throckmorton, did not base their decision upon a question of law alone, but did find and decide as a fact that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns.

7th. This Court further finds as follows: That the rancho granted by the Governor of California, under the Government of Mexico, to Juan Reed, did not include within its exterior limits the land described in the deed from T. B. Deffebach et al. to Julius C. McCeney of February 14, 1871, or any part thereof, except so much thereof as in included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al. That the grant mentioned in the first paragraph of said cross-complaint, did not include any part of the land in controversy in this action. That no grant ever made by the Mexican Government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

8th. That the land described in said deed of T. B. Deffebach et al. to Julius C. McCeney, or any part thereof, except as in the last finding above set forth, was not within the exterior boundaries of said Mexican grant.

9th. That on the 12th day of August, 1865, John J. Reed and others made, executed, and delivered to J. Clinton Bolton, for the consideration mentioned in the 5th finding above set forth, a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant, which was not included in said Matthewson survey.

10th. That on or about the 1st day of February, 1871, T. B.

Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine, and H. C. Newhall made, executed, and delivered to Julius C. McCeney a deed purporting to convey all that certain tract of land situated in the County of Marin, State of California, bounded and described as set forth in paragraph 16 of said cross-complaint.

But that neither the said T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, nor H. C. Newhall, did on the said 1st day of February, 1871, or at any other time, own, or was, or were entitled to convey to any one any of the land described in said 16th paragraph of said cross-complaint, except a small part thereof which lies within the boundaries of the patent for certain land, which was issued to the said Reed heirs on the 25th day of February, 1885, which said excepted portion of said land lies entirely without the boundary of the land described in plaintiff's complaint in this action.

11th. That on the 19th day of January, 1875, the said Julius C. McCeney, made, executed and delivered to S. R. Throckmorton, a deed purporting to convey to said Throckmorton, all of the land described in the said deed of February 1, 1871, from said T. B. Deffebach et al. to said McCeney, but that the said McCeney on said 19th day of January, 1875, or at any other time was not the owner and was not entitled to convey to any one any of the land mentioned and described in said deed from said McCeney to said Throckmorton, save and except that portion which lies within the boundary of said Reed Patent, no part of which excepted portion lies within the boundary of the land mentioned and described in plaintiff's complaint in this action.

12th. That none of the grantees named in the deeds mentioned or referred to in the 18th paragraph of said cross-complaint, purchased the lands or interests described or mentioned in said deeds, in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and rights of the plaintiff as alleged in his complaint in this action.

That neither the said Throckmorton, nor his executrix, ever had any right to use or improve any part of said lot 3 in Sec. 28 or of said lots 2 and 3 in Sec. 29; that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff.

That the said defendants, nor either of them, nor any of their nor either of their grantors or predecessors in interest, ever were in the

possession of the parcels designated respectively "A" and "B" in defendants' answer herein.

That the said grantees and each of them and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by said deeds, or any part or parcel of said lot 3 in Section 28 and said lots 2 and 3 in Section 29, were included within the said Mexican grant.

That said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in Section 28 and lots 2 and 3 in Section 29.

13th. That the evidence introduced in the matter of the application and contest mentioned in the 19th paragraph of said cross-complaint, did not show without conflict, or show at all, that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true; that the evidence introduced in the matter of said application and contest, did not establish all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; that there was conflict in said evidence; that there was evidence on said contest which contradicted Throckmorton's evidence; that the evidence as alleged in said cross-complaint was not true.

That the Register and Receiver of the Land Office at San Francisco, did not, nor did either of them, on the 9th day of February, 1886, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict; that the said Register and Receiver did not, nor did either of them, rest their or his decision, upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law, or under the law entitled to purchase the said land.

That the Commissioner of the General Land Office, on appeal from the decision of the Register and Receiver, did not base his decision upon evidence without conflict, and did not rest his decision upon the or upon a proposition of law, in deciding that Throckmorton was not entitled to purchase the said land.

That the said Secretary of the Interior did not rest his decision, affirming the decision of the Commissioner of the General Land Office, upon the or upon a proposition of law.

That the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of *Throckmorton* v. *Warmouth*, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint.

14th. That the said Throckmorton did, claiming to be a bona fide purchaser from Mexican grantees, make said application (to purchase) to the Register and Receiver of the United States Land Office at San Francisco, under Section 7 of the Act of Congress entitled, "An Act to quiet Land Titles in California."

That the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns and was not entitled to purchase the said land or any part thereof under said Act of Congress.

That the Register and Receiver of the said land office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow the plaintiff to make proof and payment for said land.

15th. That on or about the 17th day of July, 1890, Susanna M. Throckmorton made, executed and delivered to the defendant, Jacob Gardner, a deed in due form purporting to convey to said defendant Gardner, all those certain parcels of land described as lot 3 of Sec. 28 and lots 2 and 3 in Sec. 29, T. 1. N. R. 6 W. Mt. Diablo base and meridian; but the said Susanna M. Throckmorton was not the owner of said land when she executed said deed, nor was she entitled to convey the same to said Gardner.

16th. That the defendant, Jacob Gardner, did not on the 17th day of July, 1890, or at any other time, enter into the possession of said land, under said deed or remain in possession thereof, except as an intruder and trespasser upon the possession of the plaintiff, and that the said defendant, Jacob Gardner, never entered into the actual or other possessions of any part of the lands described, respectively as "A" and "B" in the defendant's answer herein.

17th. That the said Jacob Gardner is not and never was the owner in equity of said land, or of any part of the land described in plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22nd paragraph of said cross-complaint.

That said plaintiff does not hold said land or any part thereof in trust or otherwise, or at all for defendant, Jacob Gardner.

And as a conclusion of law from the foregoing facts:

The Court finds that neither the said defendant, Jacob Gardner, nor the defendant, Peter Gardner, should take anything by said cross-complaint, or by said supplemental answer.

Dated March 8, 1897. F. M. ANGELLOTTI,

Judge.

The judgment upon the same was rendered April 21, 1897, as follows:

Judgment.

[Title of Court and Cause.]

This cause heretofore, to wit, on the 9th, 12th, 13th and 19th days of February, 1897, came on regularly for trial before the Court without a jury, as to the issues raised and joined by the answer of the plaintiff to the cross-complaint of the defendant Jacob Gardner, herein, and the like issues raised by the supplemental answer of said Peter Gardner and said Jacob Gardner, on file herein, a jury trial as to said issues having been duly waived.

The plaintiff appeared by Messrs. E. B. Mahon and L. D. McKisick, his attorneys, and the defendants appeared by H. Wilkins, Esq., their attorney. Evidence was introduced on behalf of the respective parties and the case was duly argued and submitted, and by the Court taken under advisement, and afterwards, to wit: on the 8th day of March, 1897, the Court duly made and filed its written findings of facts and conclusions of law herein.

And afterwards, to wit: on the 19th, 20th and 21st days of April, 1897, this cause came on regularly for trial as to the issues raised and joined by the answer of the defendants to the plaintiff's amended complaint herein, a jury of twelve persons was regularly impaneled and sworn to try said action.

Witnesses on the part of the plaintiff and defendants respectively were sworn and examined, and oral and documentary evidence on behalf of the respective parties was offered and put in evidence.

After hearing the evidence and the arguments of the counsel, and the instructions of the Court, and the jury having retired to consider their verdict, and subsequently returned into Court, and being called answered to their names and say they find a verdict for plaintiff, as follows:

[Title of Court and Cause.]

"We, the jury, in the above-entitled cause, find for the plaintiff for the recovery from the defendants of the possession of all the land in controversy (viz.: the 46.26–100-acre tract described in the complaint, except the two portions thereof described in the answer and designated therein "A" and "B") and we assess the damages for withholding the said property at Two Thousand ($2,000) Dollars, for which sum we find for plaintiff against said defendants.

"A. GERICKE,
"Foreman."

Wherefore by reason of the law and the findings and verdict aforesaid, it is ordered, adjudged and decreed that the defendant Jacob Gardner take nothing by his said cross-complaint, and that defendants take nothing by their supplemental answer herein, and that the plaintiff, Ebenezer Wormouth, do have and recover of and from the defendants, Peter Gardner and Jacob Gardner, the possession and restitution of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:—

Beginning at post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio, running thence along said boundary line due north 2.45 chains to post marked "C. M. P. 181," thence north 9 degrees east 20.25 chains, thence leaving said boundary line due west 26.00 chains more or less to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning, being lot three (3) of Section twenty-eight (28) and lot three (3) of Section twenty-nine (29) in township No. 1 north, range No. 6 west, M. D. M., containing forty-six and twenty-six hundredths (46.26–100) acres of land, with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, (except that portion thereof bounded and described as follows:

"A." Beginning at a post marked "C. M. P. 180," running thence due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the said creek, thence descending said creek to the point of beginning.

"B." Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of said Blythedale road, running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of said rancho, thence along said fence north 8 degrees 10 minutes west 514.5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle south 8 degrees 30 minutes west 277.5-10 feet, south 16 degrees 55 minutes west 143.7-10 feet, south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.)

2d. That the said plaintiff do have and recover of and from the said defendants the sum of Two Thousand ($2,000) Dollars damages for withholding said property.

3d. That the said plaintiff do have and recover of and from the said defendants his costs and disbursements herein, taxed at $240.76.

Done in open Court this 21st day of April, A. D., 1897.

F. M. ANGELLOTTI,
Judge.

Entered April 22d, 1897.

THOS. F. BONNEAU,
Clerk.

Thereupon plaintiffs in error moved for a new trial, which application was denied. An appeal was taken to the Supreme Court of the State of California from the judgment and from the order denying a new trial, and on July 6, 1899, the same were affirmed, and the Court delivered the following opinion:—

Filed July 6, 1899.

DEPARTMENT TWO.

EBENEZER WORMOUTH, *Plaintiff and Respondent,* *v.* PETER GARDNER AND JACOB GARDNER, *Defendants and Appellants.*	S. F., No. 1143.

This is an action in ejectment to recover possession of certain lands described in the complaint. Judgment below went for plaintiff, and defendants appeal from the judgment and from the order denying a motion for a new trial.

Plaintiff claims title under a homestead entry made in accordance with the United States laws upon that subject (see *Wormouth* v. *Gardner*, 105 Cal. 149), and before the filing of the cross-complaint hereinafter mentioned he received a United States patent for the land in pursuance of his homestead entry. The principal contention of defendants for a reversal is in relation to what they call their *equitable title*. This title, as shown in the cross-complaint, is briefly as follows: It is averred that the land in contest here was within the exterior boundaries of a certain Mexican grant, made in 1835, to Juan Reed, of a certain tract of land called the Rancho Corte de Madera del Presidio—usually called the Reed Rancho; that this grant was

presented to the Land Commissioners and the United States District Court, and was confirmed; that a United States patent to the rancho was issued to the heirs of Reed in February, 1885, and that the patent excluded the land in contest in this case, and that the Reed heirs supposed the land was included within said grant, and with that understanding conveyed the same to various parties, through whom, by mesne conveyances, whatever right they had to this piece of land became vested in the defendant Jacob Gardner, whose immediate grantor was one Throckmorton. It is further averred, that in January, 1875, the said Throckmorton made application to the United States Land Department to purchase said land, under the Act of Congress, entitled "An Act to quiet titles in California," approved July 23, 1866, basing his application upon the facts hereinbefore stated, and that the plaintiff herein, Wormouth, was made a party defendant in said application, and that a contest took place in the Land Department between Throckmorton, upon his claim as aforesaid, and Wormouth as a homestead claimant; that the Register and Receiver of the United States Land Office at San Francisco, in which application was made, decided the case in favor of Wormouth, and against Throckmorton; that Throckmorton appealed to the Commissioner of the General Land Office, who also decided the case against him; and that he then appealed to the Secretary of the Interior, who again decided the case against him, and in favor of Wormouth; but that each of said officers decided the case upon an erroneous proposition of law; and that therefore it ought to be decreed that the plaintiff holds said land in trust for defendant Jacob Gardner, and should convey the same to the latter A demurrer to this cross-complaint was sustained by the court below, but upon appeal this Court held that the averments of the complaint were sufficient on their face to show that the decision of the land department had been based upon an erroneous construction of the law, and reversed the case, with directions to the Court below to overrule the demurrer—the Court declaring, however, in its opinion, very clearly, the principles upon which it should be determined whether or not the decision of the Land Department was final. See *Wormouth* v. *Gardner*, 112 Cal. 506. After the remititur went down, the plaintiff filed an answer in which all the material averments of the cross-complaint were denied. Upon the trial the defendants introduced all the proceedings had in the Land Department in the said contest of Throckmorton and Wormouth. That contest was one entirely within the jurisdiction of the United States Land Department, that is, each party was endeavoring to get title to what

each admitted to be United States government land, which was subject to disposition under the laws of the United States. The Land Department, therefore, had exclusive jurisdiction to determine all facts which arose in the contest; and in order to successfully attack the decision of the department the defendant in this present case would have to show that such decision was founded upon an erroneous notion of the law. But this he has failed to do. The department, among other things, found that the land in contest never was within the boundaries of the grant to Reed; that it was never regarded as being included in that grant, and that Throckmorton, at the time he claimed to have purchased from the Reed heirs, either knew or had good reason to believe that the land was not included in the grant, and was not a bona fide purchaser within the meaning of the Act of July 23, 1866. In *Wormouth* v. *Gardner*, 112 Cal. 506, this Court said: "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the actual possession of the same, according to the lines of his purchase, were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as his belief that the land he purchased was included within the original limits of the Mexican grant, were also facts to be determined by that officer from all the circumstances under which the purchase was made. Whether that officer properly considered the weight to which the evidence before him was entitled, or whether he drew correct conclusions from that evidence, his determination with reference to these facts, whether correct or erroneous, is conclusive upon the judicial tribunals. These tribunals cannot exercise a revisory jurisdiction over him in matters which are within the scope of the authority conferred upon him, but if, upon the undisputed facts, he made an erroneous application of the law pertinent to those facts, his action is open to review." In the case at bar it nowhere appears that the Secretary of the Interior made an erroneous "application of the law," but it does appear that his decision was based upon facts which necessarily defeated the claim of Throckmorton. For the same reasons the decision of the United States land department was conclusive as to Wormouth's title as a homestead claimant.

What appellant claims as his legal title was presented to the jury in the shape of an issue as to damages for detention of the land. The jury found a verdict of two thousand dollars, which the court reduced to sixteen hundred dollars. The United States patent to

the Reed heirs was finally determinative of the boundaries of the grant; and we see no other point in the case necessary to be discussed.

The judgment and order appealed from are affirmed.

McFARLAND, J.

We concur:

TEMPLE, J.,

GAROUTTE, J.

Certain documentary evidence was admitted on the trial without objection.

The grant referred to in paragraph 1 of the cross-complaint and the seventh finding of fact and the measurements referred to therein, all of which was in evidence, were as follows:—

"Jose Figueroa, General of Brigade of the Mexican Republic Commanding General Inspector and Superior Political Chief of Upper California.

Whereas; Don Juan Read, naturalized in the United States of Mexico, for his own personal benefit and that of his family, asked for the land known by the name of "Corte de Madera del Presidio as far as "La Punta del Tiburon" bounded by the Mission of San Rafael and the Port of San Francisco; the proper measures and examinations being previously made as required by Laws and Regulations; using the powers which are conferred on me in the name of the Mexican Nation, I have, by decree of this day granted to the aforesaid Don Juan Read the above-mentioned land, declaring to him the ownership of it by these presents, said grant being understood to be in entire conformity with the laws, subject to the approval or disapproval of the Most Excellent Territorial Deputation and of the Supreme Government, and under the following conditions:—

1st. That he will submit to those (conditions) which may be established by the regulation which is to be formed for the distribution of vacant lands, and that in the meantime neither the grantee nor his heirs can divide or alienate that which is granted to them, subject it to any tax, entail, pledge, mortgage or other incumbrance even for pious purposes nor convey it to mortain.

2nd. He may enclose it without prejudice to the crossings, roads and servitudes; he will enjoy it freely and exclusively, applying it to the use and cultivation which may best suit him; but within one year at furtherest, he will build a house and it will be inhabited.

3d. When the ownership is confirmed to him, he will request

the proper magistrate to give him juridical possession in virtue of this patent by whom the boundaries will be marked out, in the limits of which he will place some fruit or forest trees of a useful character.

4th. The land of which donation is made is one square league a little more or less, as shown by the map which goes with the expediente. The magistrate who may give the possession will cause it to be measured in conformity with the ordinance in order to mark out the boundaries leaving the surplus which may result to the nation for its convenient uses.

5th. If he contravene these conditions he will lose his right to the land and it will be denounceable by another person.

In consequence I order that this present, serving him for a title and being held as firm and valid, note be made of it in the corresponding book, and it be delivered to the person interested for his security and other purposes.

Given at Monterey on the second of October, eighteen hundred and thirty-four.

(Signed) JOSE FIGUEROA.

(Signed) AGUSTIN V. ZAMORANO, Secretary.

Note has been made of this title (in the book) of entries of grants of lands on folio fifty-four, number fifty-two which exists in the Secretaria in my charge. In Monterey on the 2d of October, 1834.

(Signed) ZAMORANO.

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* * * Being in the fields in the place named "Corte de Madera del Presidio de San Francisco" on the twenty-seventh day of the month of November, one thousand eight hundred and thirty-five, I, the constitutional Alcalde, acting in virtue of my office with two assistant witnesses for want of a public Notary, the witnesses by me examined present citizen Juan Read owner of said lands, and citizen Fernando Felis on the part of the Pueblo of San Rafael, as mayor domo of said pueblo and community, the only colindante on the north, I proceeded to see and examine the lands of said rancho, and for greater clearness, mounting on horseback in company with both the parties and witnesses referred to, I ordered the latter to point out to me the places, limits, and boundaries of them,

17052

according to the signs which they have declared on their depositions, and in conformity they led the way to the west to a canada where they showed me a forest of tall trees which they call redwoods in the canada itself, and some little valleys which form the base of the high peak called "Palmos," which forest is called "Corte de Madera del Presidio," a little brook with a willow thicket, and the remains of a rancheria called "Anamus"; thence continuing the examination and view of said lands they led me north to another arroyo and forest of redwood trees called also "Corte de Madera de San Pablo" and they said it was the boundary with the Pueblo of San Rafael; and thence continuing the examination south as far as Point Taburon, which they said was the limit in that direction; we continued to the west to the point of an Estero which empties in the bight formed by said Point Taburon and Point Caballos on the south and which ends at the entrance of said canada where is situated the house of the owner of said lands, Don Juan Read, the arroyo, willow thicket, and forest of redwood trees named "Corte de Madera del Presidio" aforesaid which they said was the last boundary of the said lands pertaining to the rancho referred to, of "Corte de Madera" of Senor Read; which places I, the constitutional Alcalde, saw and examined with those of my assistance and said witnesses, and the papers presented, having been compared with said examination, the identification of the aforesaid lands proved to be certain according to the declarations of the witnesses; and in testimony I make official record of it and sign it with those of my assistance and others who knew how; to which I certify.

(Sgd.) HARO.
" FERNANDO FELES.
" JOSE DE LA C. SANCHEZ.
" TOMAS JEREMIAS JONES.
" MANUEL SANCHEZ.

Assisting witnesses
(Signed) EUSEBIO GALINDO.
" FRANCISCO SANCHEZ.

The decision of the Board of Land Commissioners, to whom the heirs of Juan Reed, made application under the act of March 3, 1851, referred to in paragraph 4 of the cross-complaint, and which was in evidence, is in the following words and figures:—

HEIRS OF JUAN READ
v.
THE UNITED STATES.

In this case on hearing the proofs and allegations, it is adjudged by the Commission that the said claim of the petitioners is valid and it is therefore hereby decreed that the same be confirmed.

The land of which confirmation is hereby made is the same on which said Juan Read resided in his life time; is known by the name of Corte de Madera del Presidio, is situated in Marin county and bounded as follows. to-wit: Commencing from the solar which faces west at a point at the slope and foot of the hills which lie in that direction and on the edge of the forest of redwoods called Corte de Madera del Presidio, and running from thence in a northwardly direction four thousand five hundred varas to an arroyo called Holon where is another forest of redwoods called Corte de Madera de San Pablo; thence by the waters of said arroyo and the Bay of San Francisco ten thousand varas to the Point Taburon, said point serving as a mark and limit; thence running along the borders of said bay and continuing in a westwardly direction along the shore of the bay formed by Point Caballos and Point Taburon, four thousand seven hundred varas to the north of the Canada and the point of the "Sausal" which is near the Estero lying east of the house on said premises which was occupied by said Juan Read on November, 1835; and thence continuing the measurement from east to west along the last line eight hundred varas to the place of beginning; containing one square league of land, be the same more or less; being the same land described in the testimonial of juridical possession on file in this case, as having been measured to said Juan Read under a grant of the same to him, to which testimonial and the map therein referred to and constituting a part of the espediente a traced copy of which is filed in the case reference is to be had.

ALPHEUS FELCH,
R. AUG. THOMPSON,
Commissioners.

[Endorsed:] No. 497. Heirs of Juan Reid. Corte de Madera del Presidio. Decree of Confirmation. Filed in office June 13, 1854.

GEO. FISHER,
Secretary.

The judgment of the U. S. District Court affirming the decision of the Land Commissioners last set forth and referred to in paragraph 4 of the cross-complaint, and which was in evidence, is as follows:—

"In the District Court of the United States, Northern District of California.

THE UNITED STATES, *Appellants,* v. HEIRS OF JOHN READ, *Appellees.*	No. 183. Corte de Madera del Presidio. Transcript No. 497.

Stated Term, January 14, 1856.

On appeal from the final decision of the Board of Commissioners to ascertain and settle private land claims in California.

Decree.

This cause came on to be heard at a stated Term of the Court on appeal from the final decision of the Board of Commissioners to ascertain and settle the private land claims in the State of California under the Act of Congress approved on the 3d of March, A. D., 1851, upon the transcript of the proceedings and decision of the Board of Commissioners, and the papers and evidence on which the said decision was founded, and it appearing to the Court that the said Transcript has been duly filed according to law, and counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed that the said decision be, and the same is hereby in all things affirmed, and it is likewise further ordered, adjudged and decreed that the claim of the Appellees is a good and valid claim, and that the said claim be, and the same is hereby confirmed to the extent and quantity of one square league, being the same land described in the grant and of which the possession was proved to have been long enjoyed. Provided that the said quantity of one square league now confirmed to the claimants be continued within the boundaries called for in the said grant and the map to which the grant refers, and if there be less than that quantity within the said boundaries, then we confirm to the claimants that less quantity.

OGDEN HOFFMAN, JR.,
U. S. District Judge.

The application of S. R. Throckmorton, on October 20, 1880, to the Registrar and Receiver of the U. S. Land Office at San Francisco, California, and the Hon. Commissioner of the General Land Office, Washington, D. C., under the Act of July 23, 1866, referred to in paragraph 19 of the cross-complaint, and the first finding of fact, and which was in evidence, is as follows:—

"To the Register and Receiver of the U. S. Land Office at San Francisco, California, and to the Honorable Commissioner of the General Land Office, Washington, D. C.:

Now comes SAMUEL R. THROCKMORTON, a native-born citizen of the United States, over the age of twenty-one years, residing in the City and County of San Francisco, State of California, and respectfully shows that he is a purchaser of a portion of the Rancho Corte Madera del Presidio in Marin County, State of California, granted to Juan Reed by the Mexican Government, and confirmed by the U. S. District Court for the Northern District of California, surveyed by the U. S. Surveyor General for California, and the survey, so far as the western line of said Rancho Corte Madera del Presidio is concerned, duly approved by the Honorable Secretary of the Interior, by his decision dated May 3rd, 1880, and hereby applies to purchase under the 7th Section of the Act of Congress, approved July 23rd, 1866, that portion of the Rancho Corte Madera del Presidio, excluded from the final survey of said Rancho, situate, lying and being in sections 28 and 29, township 1, north range 6 west Mt. Diablo meridian, containing seventy-three and 86-100 (73.86) acres, as shown by the accompanying survey of said tract so excluded, made by G. F. Allardt, Deputy U. S. Surveyor for the State of California, and in support of his application to purchase, herewith files his affidavit, together with certified copies of the deeds of conveyance from the several parties from whom he deraigned title, viz: deed from John J. Reed et al. to James C. Bolton, dated August 12, 1865; deed from James C. Bolton to Rodolph Steinbach, dated September 16, 1865; deed from Rodolph Steinbach to Emil Steinbach, dated March 28, 1866; power of attorney from Emil Steinbach to Rodolph Steinbach, dated February 18, 1864; deed from Emil Steinbach to Emil Grisar, dated June 16, 1866; deed from Emil Grisar to S. R. Throckmorton, dated June 19, 1866; deed from J. C. Bolton to Thos. B. Valentine, dated July 25, 1868; deed from John J. Reed to Hugh A. Boyle, dated May 11, 1869; deed from Hilarita Reed to Hugh A. Boyle, dated May 24, 1869; deed from Thos. B. Deffebach et al. to Julius C. McCeney, dated February 1, 1871; deed from Julius C. McCeney to S. R. Throckmorton, dated January 19, 1875.

The tract sought to be purchased was excluded from the final survey aforesaid, and is now in the possession of your petitioner, and he asks that he be permitted to purchase same as provided in the 7th section of the Act of Congress approved July 23, 1866.

That the land sought to be purchased by applicant is included

and embraced within the exterior boundaries of the Rancho Corte Madera del Presidio, granted to Juan Reed by the Mexican Government and confirmed to his heirs by the United States.

S. R. THROCKMORTON.

SAN FRANCISCO, October 20th, 1880.

STATE OF CALIFORNIA, City and County of San Francisco. } ss.

SAMUEL R. THROCKMORTON, being first duly sworn, upon his oath deposes and says: that he is a native-born citizen of the United States, over the age of twenty-one years; is a resident of the City and County of San Francisco, State of California, that he has acquired by purchase from the heirs of Juan Reed, the original Mexican grantee of the Rancho Corte Madera del Presidio, for a valuable consideration, that certain piece or parcel of land in Marin County, State of California, situate in sections 28 and 29, township 1, north range 6 west, Mt. Diablo meridian, containing eighty and 24-100 acres, being a portion of the Rancho Corte Madera del Presidio, granted by the Mexican Government to Juan Reed, and confirmed to the heirs of said Reed by the U. S. District Court for the Northern District of California; that said rancho has been surveyed by the U. S. Surveyor General for California; and the western line thereof duly approved by the Hon. Secretary of the Interior, in his decision dated May 3, 1880; that by said survey and decision, the western line of said rancho has become established and approved; that 73 and 86-100 acres of the land purchased by affiant from the heirs of Juan Reed, Mexican grantees or their assigns, has been excluded from the final survey of said Rancho; that said tract of land so excluded is embraced within the exterior boundaries of the Rancho Corte Madera del Presidio, confirmed to the heirs of Juan Reed, and forms a part thereof; that affiant, ever since June 19, 1866, has been in the actual, quiet and peaceable possession of said tract of land, according to the lines of the original grant and deed of conveyance to him, and has used and improved the same, save and except that portion described in the field notes—(marked Exhibit "A")—attached hereto and made a part hereof, which is not in his possession, but it is also sought to be purchased by him; that a portion of the land, viz: 6 and 38-100 acres, so purchased, is included in the survey of the Rancho Corte Madera del Presidio; that a survey of said tract of land excluded from the final survey of said rancho and sought to be purchased by affiant has been made by G. F. Allardt, Deputy U. S. Surveyor, and the field notes thereof are filed

herewith and made a part hereof — marked Exhibit "B" — that there are no valid adverse rights or titles to said tract of land to his knowledge; that the government lands in township 1, north range 6 west, Mt. Diablo meridian, have been surveyed, and by order of the Honorable Commissioner of the General Land Office, the official plat of survey was filed in the U. S. Land Office at San Francisco, California, on the 2d day of August, 1880; that this is the first opportunity affiant has had to present his claim for the land excluded from the final survey of said rancho, and he now applies to purchase the same as provided by the 7th section of the Act of Congress, approved July 23, 1866; that to the best of affiant's knowledge and belief the lands sought to be purchased contain no mines of gold, silver, copper, or cinnabar; that the tracts of land sought to be purchased are designated on the official plat of township 1, north range 6 west, Mt. Diablo meridian, as lot No. 3 of section 28, containing 3 and 16-100 acres; part of lot 2, section 28, containing 2 and 27-100 acres; part of northeast quarter of section 29, containing 22 and 16-100 acres; part of lot 2, section 29, containing 2 and 87-100 acres, and the whole of lot 3, section 29, containing 43 and 10-100 acres, making a total of 73 and 86-100 acres; that the land purchased as aforesaid, is inclosed by a good, substantial inclosure; that the land not in possession of affiant, viz: 14 and 61-100 acres is within his said inclosure and a suit in ejectment is now pending wherein affiant seeks to recover the possession of the same. S. R. THROCKMORTON.

Subscribed and sworn to before me this 20th day of October, 1880. J. A. ROBINSON,
U. S. Commissioner.

The decision of the U. S. Land Office at San Francisco upon said application referred to in paragraph 20 of the cross-complaint and the second and third findings of fact and which was in evidence, is as follows: —

DECISION OF U. S. REGISTER AND RECEIVER.

U. S. Land Office,
San Francisco, Cal'a,
Aug. 11, 1885.

S. R. THROCKMORTON,
v.
EBENEZER WORMOUTH.

The records of this office show that S. R. Throckmorton, on October 20, 1880, made application to purchase, under 7th section Act of July 23, 1866, lot 3, Section 28, and lots 2 and 3 and southeast ¼ of northeast ¼ Section 29, T. 1 N. R. 6 W., M. D. M.

Ebenezer Wormouth filed D. S. No. 10661, December 18, 1874, alleging settlement March 1, 1859, for lot 3, Section 28, and lot 3, Section 29, same township and range.

Said filing was decided to be premature and illegal by letter of Hon. Commissioner G. L. O. of Aug. 31, 1880—"G" in case of R. S. Brown.

Said Wormouth on September 14, 1880, filed D. S. No. 15517, alleging settlement, March 5, 1859, claiming the same land as in his previous filing. On May 20, 1881, said Wormouth made H. E. No. 4415 upon the same land. Township plat filed December 5, 1874. Sections 16, 17, 20, 21, 28, and 29, suspended March 1, 1875. Suspension removed except as to lots 2 and 3, Section 28, and lots 2 and 3 and southeast ¼ of northeast ¼ Section 29, August 12, 1875, by letters of Surv'r Gen'l for California of August 7, 1875.

Plat withdrawn from office August 13, 1875, and returned and filed in this office August 2, 1880. The testimony shows that in August, 1865, the heirs of Reed, the Mexican grantee of the Rancho "El Corte de Madera del Presidio," made a conveyance to one Bolton of one undivided half interest in all land in the said rancho outside of the Mathewson survey of the same; the consideration being $1.00 and other considerations.

In June, 1866, Throckmorton purchased from a party holding under Bolton an undivided one fourth of said rancho, outside of the Mathewson survey. None of the deeds prior to 1866 in the chain of title from Bolton to Throckmorton conveyed any land by specific boundaries or any land but an undivided interest in such land as was included within the "El Corte de Madera del Presidio" outside of the lines of the Matthewson survey.

In January, 1875, the various parties holding an interest in the land in said rancho outside of the Matthewson survey joined in a deed to Throckmorton conveying a specific tract, but whether that deed included the land in contest or not is immaterial, since it does not appear that any one of the grantors named therein had any interest in any land not included in the Rancho "El Corte de Madera el Presidio" in July, 1866, or had acquired it from any party who had purchased the land in good faith from the Mexican grantee or his assigns prior to that date.

Throckmorton's claim must therefore be rejected, for the reason

that neither he nor his grantors prior to July 23, 1866, had purchased the tract applied for from the Mexican grantee of the Rancho "El Corte de Madera del Presidio" or from his assigns.

Wormouth, in 1859, purchased the improvements of a prior occupant on a tract that included the land applied for with other land since included in the lines of Corte de Madera Grant.

His first house was included within one survey of that grant. He then built another, and that also was included in another survey of the same grant. In 1880 he built a third house on that part of his claim, that is, outside of the grant, and on the land in contest. His residence, improvement, and cultivation so far have been sufficient to show his good faith, and he should be allowed to enter the land on advertising according to law and making final proof.

CHAS. H. CHAMBERLAIN,
Receiver.

WM. R. WHEATON,
Register.

The decision of the Secretary of the Interior on the appeal of said case from the Department of the Interior, General Land Office at Washington, D. C., to which Department an appeal had been taken by said Throckmorton, and by which the decision of the Land Office at San Francisco had been sustained—referred to in paragraph 20 of the Cross-complaint and the third and fourth Findings of Fact, which were in evidence, is as follows:—

Department of the Interior,
Washington,
October 24, 1891.

S. R. THROCKMORTON
v.
EBENEZER WORMOUTH. } Mexican Grant.

Commissioner of the General Land Office,

SIR:—I have examined the record in the case of S. R. Throckmorton against Ebenezer Wormouth, involving the right to lot 3, section 28, and lots 2 and 3, and the S. E. ¼ of the N. E. ¼ section 29, T. 1 N., R. 6 W., San Francisco, California.

The land is claimed by Wormouth under his homestead entry, made May 20, 1881.

Throckmorton's claim is based on a purchase from the heirs and assigns of Juan Reed, the grantee under a Mexican grant, known

as the Rancho *Corte de Madera del Presidio*, which was confirmed by the Board of United States Land Commissioners, June 13, 1854.

The description in said confirmation was, by metes and bounds, as follows:—

"The land of which confirmation is hereby made is the same on "which said Juan Read resided in his lifetime; is known by the "name of Corte de Madera del Presidio; is situated in Marin "County and bounded as follows, to wit: — Commencing at the "Solar which faces west, at a point at the slope and foot of the "hills which lie in that direction and on the edge of the forest of "redwoods, called Corte de Madera del Presidio, and running from "thence in a northwardly direction four thousand, five hundred "varas, to an arroya called Holon, where is another forest of red-"woods called Corte de Madera de San Pablo; thence by the waters "of said arroyo and the Bay of San Francisco ten thousand varas to "the Point Taburon, said point serving as a mark and limit; "thence running along the borders of said bay and continuing "in a westwardly direction along the shore of the bay formed by "Point Caballos and Point Taburon, four thousand, seven hundred "varas to the north of the Canada and the point of the 'Sausal,' "which is near the Estero lying east of the house on said prem-"ises, which was occupied by said Juan Read in November, 1835, "and thence continuing the measurement from east to west along "the last line eight hundred varas to the place of beginning: con-"taining one square league of land, be the same more or less; "being the same land described in the testimonial of juridical pos-"session on file in this case, as having been measured to said Juan "Read under a grant of the same to him."

This claim was surveyed in 1858 by United States Deputy Surveyor R. C. Mathewson. This survey was of quantity and made to approximate one square league and contained 4,460.24 acres.

August 12, 1865, the heirs of Juan Read (original grantee from the Mexican Government) conveyed to one James C. Bolton, a lawyer of New York City, "All the undivided one-half part of all the "Rancho Corte de Madera del Presidio . . . which is not in "the survey of said rancho, which was made under instructions "from the U. S. Surveyor General for the State of California by "R. C. Mathewson." Subsequent to the sale of this undetermined and undivided interest . . . to wit: In November and December, 1873, and June, 1874 . . . a re-survey was made by direction of this Department, which was accepted by your office, and patent issued for the land therein described. February, 25, 1885.

The last survey, upon which patent issued, described the grant by metes and bounds, and was intended to conform to the description contained in the original grant by the Mexican Government. This survey contained 7,854.12 acres, or 3,393.88 acres in excess of the Mathewson survey.

It was a one-half interest in this excess that was conveyed to Bolton, and the consideration therefor was his "professional services" in procuring a new survey and patent for all the land thus shown to be embraced in the grant.

June 19, 1866, Throckmorton, through several transfers from Bolton, procured title to an undivided half of Bolton's interest, or an undivided one-fourth interest in that part of the rancho not included in the Mathewson survey.

January 19, 1875, the heirs of Read and their transferees conveyed to Throckmorton, by metes and bounds, the land in controversy, containing between seventy-three and seventy-four acres. This land is not included in the grant to Read as last surveyed, nor can I find from the record that it was included in the Mathewson survey. Throckmorton claims the right to purchase it under the 7th section of the act of July 23, 1866 (14 Stat., 218).

That section provides:

"That where persons in good faith and for a valuable considera-
"tion have purchased lands of Mexican grantees or assigns, which
"grants have subsequently been rejected, or where the lands so
"purchased have been excluded from the final survey of any Mex-
"ican grant; and have used, imposed, and continued in actual pos-
"session of the same as according to the lines of their original pur-
"chase, and where no valid adverse right or title (except of the
"United States) exists, such purchasers may purchase the same."

It cannot, I think, be seriously contended that the interest acquired by Bolton to the undivided "half-part" of the land in excess of the Mathewson survey that should be acquired by a new survey, is such an interest as would entitle him or his transferee, Throckmorton, to purchase under said act. His rights, if he has any, must depend upon his purchase of January 19, 1875, in which he purchased by metes and bounds, from the heirs and assigns of Juan Read, the land in controversy, which joins the Rancho Corte de Madera del Presidio on the west.

At the date of this purchase, the new survey had already been made, and was awaiting approval by this Department, which fact must have been known to Throckmorton, for he had long before

acquired title, through Bolton, to an undivided one-fourth interest in the excess that should be procured by the new survey. That survey did not embrace the land in controversy, but formed a part of the eastern boundary thereof; in other words, the land claimed by Wormouth and Throckmorton is immediately west of the western boundary of the rancho, as established by the last survey, which said western boundary, according to the best evidence I can get from the record, is the same as that established by Mathewson. In order that he may be entitled to purchase under said section 7, it must appear that he was a purchaser in *good faith* * * that is, as I construe it, he must have believed that the lands so by him purchased were within the limits of the grant, as originally defined, where, as in this case, the granted land is described by metes and bounds. If, on a proper survey by the government, the land so purchased should be found to be outside the limits of the grant, he would be entitled to purchase under said section, because he had originally purchased and paid for the land in the honest belief that his grantors had the right to convey.

I find nothing in the evidence to convince me that this land was ever occupied, cultivated, or improved by Reed, his heirs, or assigns, prior to the purchase by Throckmorton. The only evidence of any occupation prior to 1872, other than Wormouth's, is the testimony of Throckmorton himself and his rentor, that as far back as 1857 there was a fence along the southwestern boundary of the land in dispute. Who built the fence, or for what purpose, is not shown in the evidence, it may have been to mark the northern boundary of the Rancho Saucelito, which joins this on the south, or it may have been placed there by some one designing to claim the land from the government, or for many other purposes. The evidence is entirely insufficient to show that Read or his heirs or assigns placed it there either to improve or mark the boundary of their claim.

It is true that in 1872, prior to his purchase, Throckmorton inclosed the land with a fence, and has been grazing the same ever since, except about fourteen acres included in Wormouth's house lot. He claims that this was done in pursuance of an amicable partition, setting apart his interest, the deed to which was made by the several grantees to one McCeney, and by him conveyed to Throckmorton, January, 19, 1875.

It is shown in evidence that, at the time Throckmorton commenced to inclose this land (1872), he was notified by Wormouth (who was there residing on the land) of his claim thereto.

The evidence on the part of Wormouth shows that he has made his home on the land ever since 1859, and that at that time and ever since the land was understood in the neighborhood to be government land and was never supposed to be included in the grant to Read.

The evidence shows beyond the shadow of a doubt that at the several dates at which Throckmorton's interests attached, the boundaries to this grant were in dispute, and that he purchased with full knowledge of the unsettled condition of the boundaries. His first purchase of an undivided half of Bolton's interest was made on speculation, and depended for its value on a change in the boundaries as established by the Mathewson survey. His purchase in 1875 of the land in controversy was made before these boundaries had been finally established and with full knowledge of that fact, as well as the claim of Wormouth.

Section 7 of the Act referred to was not, in my judgment, intended for the protection of such a purchaser, but applies only to a purchaser who buys relying on the boundaries as generally accepted and supposed to be the correct ones, and which afterwards, by the final survey, are found to be incorrect, whereby his land is shown to be outside the grant, and affords no protection to one who buys knowing that the boundaries are in dispute, and that a new survey has already been ordered to determine the true boundaries. Such a purchaser must abide the result of the survey and cannot and should not be allowed to claim the right to purchase land under said Act that has for more than twenty years been occupied, claimed and improved by a settler and claimed under the government land laws. But, aside from the speculative character of this purchase, an examination of the record history of this grant satisfies me that Throckmorton is without a plausible pretext to be considered an innocent and unsuspected purchaser.

The grant, as shown by the *expediente*, was described by metes and bounds, and was in no sense of the word a float to be located somewhere within defined exterior boundaries.

In the petition of Juan Reed, to the General of the Territory of Upper California, the land is described as "*El Corté de Madera del* "*Presidio* to the *Punta del Tiburon*, as shown by the sketch or plan "which your Excellency has in your possession." In the grant itself it is described as "known by the name of Corte de Madera "del Presidio as far as La Punta del Tiburon, bounded by the "mission of San Rafael and the Port of San Francisco, the proper "measures and examinations being *previously* made as required by "laws and regulations."

In the measurement made by the Alcalde, when juridicial possession was given to the grantee, the grant is described as starting from a "forest called Corte de Madera del Presidio, a little "brook with a willow thicket, and the remains of a rancheria "called 'Anamus,' thence continuing the examination and view "of said lands they (the witnesses) led me *north* to another "arroyo and forest of redwood trees, called also Corte de "Madera de San Pablo, and they said it was the boundary with "the pueblo of San Rafael, and thence continuing the examination "south as far as point Tiburon, which they said was the limit in that "direction, we continued to the west to the point Estero, which "empties in the bight formed by said point Tiburon and point "Caballos on the south, and which ends at the entrance of said "Canada, where is situated the house of the owner of said lands, "Don Juan Read, the arroyo, willow thicket, and forest of redwood "trees, named Corte de Madera del Presidio, aforesaid, which they "said was the last boundary of the said lands pertaining to the "rancho referred to of Corte de Madera of Senor Read."

The description in the confirmation heretofore given starts from the same point, the "forest of redwoods called Corte de Madera del "Presidio, running thence in a *northwardly* direction four thousand "five hundred varas to an arroyo," etc. Thus, it will be seen that in the expediente, the grant itself, the measurement in the juridical possession and in the decree of confirmation by the United States Commissioners, the land is definitely described as fixed and determined.

In all the measurements and surveys, including the Mathewson and the last approved survey, the starting point was identical, and was on the western boundary of the grant, thence invariably either north (as in the juridical measurement), or northwardly, (as in the confirmation description), to an arroyo (stream) called Hulon, thus showing that the western boundary of the grant from the starting-point to the Hulon was a straight line, and so could not have followed the meanderings of the Arroyo Corte de Madera del Presidio, along which the ancient fence was situated, as claimed by Throckmorton.

These measurements and surveys, except the last one, were of record when Throckmorton's rights attached, and I cannot find that the western boundary was ever in dispute, certainly the land in question was never included in any measurement or survey from which it was excluded by a subsequent one, which was finally approved.

I find that the land in question has always been public land, and has never been regarded by disinterested people as being included in the grant to Read, and that Throckmorton, when he purchased the land in controversy, either knew or had good reason to believe that the land was not included in said grant, and that he was therefore not a bona fide purchaser within the meaning of the Act of July 23, 1866, (14 Stat., 218).

The decision of your office, denying his application to purchase under said act, is accordingly affirmed, and the papers are herewith returned.

Very respectfully,

GEO. CHANDLER,
Acting Secretary.

All of the proceedings of the Land Department were in evidence, and upon the equitable branch of the case, evidence was introduced to support the allegation of the cross-complaint, by both parties for and against, independent of said records.

In the Supreme Court of the United States.

JACOB GARDNER AND PETER GARDNER,
Plaintiffs in Error,
v.
EBENEZER WORMOUTH,
Defendant in Error.

In the Supreme Court of the State of California.

EBENEZER WORMOUTH,
Plaintiff and Respondent,
v.
JACOB GARDNER AND PETER GARDNER,
Defendant and Appellant.

Order Allowing Writ of Error With Supersedeas.

Upon the annexed petition of Jacob Gardner and Peter Gardner, the appellants therein mentioned, and as plaintiffs in error as therein mentioned, through George W. Monteith, Esq., their

attorney, and upon the filing of the petition for a writ of error and assignment of errors, it is hereby ordered that a writ of error be and is hereby allowed to have re-examined and reviewed in the Supreme Court of the United States, the decision and final judgment heretofore entered in the Supreme Court of the State of California in said cause herein, the said Jacob Gardner and Peter Gardner are the appellants and the said Ebenezer Wormouth is the respondent, the said cause being numbered in the records of the Supreme Court of the State of California, "San Francisco, No. 1143."

And it is further ordered that the amount of the bond upon said writ of error, and for the purpose of having suspended and stayed all further proceedings in said Supreme Court of the State of California and in the Superior Court of the State of California, in and for the County of Marin, upon or in pursuance of said decision and the said final judgment of the Supreme Court of the State of California, until the determination of said writ of error by the Supreme Court of the United States, is hereby fixed at twenty-five hundred ($2500) dollars.

And it is ordered that upon the giving by the said Jacob Gardner and Peter Gardner, said appellants as said plaintiffs in error, of said bond in said sum of twenty-five hundred ($2500) dollars, and when approved by the Chief Justice of the Supreme Court of the State of California, the Justice allowing the issuance of said writ of error, that all further proceedings in said Supreme Court of the State of California and in said Superior Court, be stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated August 8, 1899.

(Signed) W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

In the Supreme Court of the United States.

JACOB GARDNER AND PETER GARDNER,
Plaintiffs in Error,
v.
EBENEZER WORMOUTH,
Defendant in Error.

In the Supreme Court of the State of California.

EBENEZER WORMOUTH,
Plaintiff and Respondent,
v.
JACOB GARDNER AND PETER GARDNER,
Defendants and Appellants.

Assignment of Errors.

And now, to wit: on this the day of August, A. D., 1899, Jacob Gardner and Peter Gardner, the above-named plaintiffs in error, come by George W. Monteith, Esq., their attorney, and say: That in the record and proceedings of the above-entitled matter, there is manifest error in this, to wit:—

I.

The said Supreme Court of the State of California erred in affirming the judgment of the Superior Court of said State, in and for the County of Marin therein, in the following particulars, to wit:—

(*a*) In holding and deciding that the finding of said Superior Court upon the evidence before it, to wit:—

"1st. That on the first day of February, A. D., 1891, plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto, had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto had been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying, and being in the County of Marin, State of California, and bounded and described as follows, to wit:" (particularly describing the land that was the subject matter of the cause of action then pending between the parties hereto in said Superior Court); was sustained by the evidence in the case.

(*b*) In not holding and deciding that the said plaintiff therein, Ebenezer Wormouth was not the owner of the land in controversy, or any part thereof, in that the evidence in said case did show without any material or substantial conflict whatever that the defendant therein, Jacob Gardner, was, on the first day of February, A. D., 1891, the owner of said premises then in the possession thereof, and then entitled to the possession thereof, and from thence hitherto had been the owner, and entitled to the possession thereof, and

that his ownership and title to said premises was, by reason of his being through mesne conveyances there in evidence, the successor in interest of John J. Reed, Hilarita M. Reed, and Inez Reed Deffebach, who, at the time of the acquisition of California from the Mexican government, were the Mexican owners of the premises and under the Treaty of Guadalupe Hidalgo entitled to remain in possession thereof at that time (their right thereto having been confirmed by the United States District Court for the Northern District of California, in a proper proceeding concerning the same, under the Act of Congress of March 23, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California."

(c) In holding and deciding that the finding of said Superior Court, to wit:—

"That on said first day of February, A. D , 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without any right and title, wrongfully and unlawfully entered into and upon the same and ousted and ejected plaintiff from the same," (excepting certain specific portions) was sustained by the evidence in said case.

(*d*) In not holding and deciding that upon the first day of February, A. D., 1891, the said defendant, Jacob Gardner, was lawfully in the possession of said land and premises under a title, right and possession acquired by him through mesne conveyances from Juan Reed, who, in 1835, had obtained a valid title to said premises from the Mexican government, and whose heirs, John J. Reed, Hilarita M., Reed, and Inez Reed Deffebach, at the time the Treaty of Guadalupe Hidalgo was made, were in possession of and who were entitled thereto, under said treaty, and who from the time of said treaty, by themselves and by their successors, including said Jacob Gardner, had been in lawful, continuous, actual, and adverse possession of said premises from the month of November, 1835, down to and including said first day of February, A. D., 1891.

(*e*) In not holding and deciding that the evidence before said Superior Court, as contained in the record upon the appeal therefrom to said Supreme Court of said State of California, did show, without any material or substantial conflict, that Jacob Gardner was the owner of said premises, in the possession thereof, and entitled to a possession thereof, under a valid and vested right and title thereto, under the constitution and laws of the United States, and under the Treaty of Guadalupe Hidalgo, and as the lawful successor in interest of the said John J. Reed, Hilarita M. Reed, and Inez Reed Deffebach, to whom the same had been decreed by the

United States District Court in and for the Northern District of California.

II.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that under the Constitution and laws of the United States, the right and title claimed by the said plaintiff Wormouth to the premises, was invalid and was based upon and under a pretended homestead entry, that had been made by the said Wormouth, in the United States Land Office at San Francisco, California, and that was predicated upon a forcible entry of the said Wormouth into a portion of the premises in controversy, at a time when the predecessors in interest of the said Jacob Gardner, were in lawful, actual, exclusive and adverse possession thereof, and at a time when the United States was not in possession of any portion thereof.

III.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the title claimed by said plaintiff Wormouth, was one based wholly upon and under the laws of the United States, with reference to the disposition and sale of the public lands of the United States by the United States Land Department, and was one wherein the officers of said Land Department had assumed to convey to the said Wormouth the premises in controversy, which the evidence in the record before said Supreme Court, did show, without any material or substantial conflict, never was a part of, and never had been a part of or included within the public lands of the United States, and to which the United States never had any lawful right, title or interest in, or claim to, and which the officers of the United States in the Land Office at San Francisco, California, and in the Land Department of the United States, never had or had had any jurisdiction of or control over, under the laws and Constitution of the United States, but which for many years prior to, and at the time of the acquisition of California by the United States, under said treaty, were and ever since have been private lands, and held and owned by the predecessor in interest of said Jacob Gardner, whose title thereto accrued long before the making of said Treaty of Guadalupe Hidalgo, between the United States and the Republic of Mexico, and which right and

title was recognized by and vested in them by said treaty, and by them, through mesne conveyances transmitted to said Jacob Gardner.

IV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that the rights claimed by both parties to the premises in controversy, were dependent wholly upon, and were under the Constitution, treaties and laws of the United States, and that under the Constitution, treaties and laws of the United States, the title, ownership, and right of possession claimed by the said Wormouth, were invalid and wholly void.

V.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that as it appeared in the evidence contained in the record before said Supreme Court, without any material or substantial conflict, that the entire claim of the said plaintiff, Wormouth, to the premises was as a homestead claim under the laws of the United States; at the time the proceeding was instituted he had not acquired any title from the United States to the premises.

VI.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the original homestead entry under which the said plaintiff, Wormouth, claimed title to the premises in controversy was void, in that it appeared that at the time said entry was made S. R. Throckmorton, the predecessor in interest of the said Jacob Gardner, was in actual, exclusive, and adverse possession of the premises, claiming under a right and title vested in him by virtue of said treaty, against that of the United States, and by reason of which, under the laws, treaties, and Constitution of the United States said homestead entry, and all subsequent proceedings in the Land Department based thereon, were absolutely void.

VII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing

the same, upon the ground that all questions of title to, possession, or ownership of the premises in controversy, of both parties, were upon and under the Constitution, treaties, and laws of the United States, under which it appeared in the record before said Supreme Court, without any material or substantial conflict, that the title claimed by the said plaintiff, Wormouth, was wholly void, and that the title claimed by the said defendant, Jacob Gardner, was thereunder valid and well vested.

VIII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of said Superior Court, to wit:—

"1st. That on the first day of February, A.D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto had been the owner of and entitled to the possession of that certain piece or parcel of land and premises" (describing the premises described in the complaint in said action in said Superior Court), was under the Constitution, treaties, and laws of the United States, wholly contrary to and unsustained by the evidence in said case appearing in the record on appeal before said Supreme Court.

IX.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of the Superior Court, to wit:—

"2d. That on said first day of February, A.D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said lands and premises the defendants, without right or title, wrongfully and unlawfully entered into and upon the same," and ousted and ejected plaintiff from the same (excepting a certain portion thereof therein described), was under the Constitution, treaties, and laws of the United States, contrary to and unsustained by the evidence.

X.

That the Supreme Court of the State of California erred in affirming the judgment of the said Superior Court, and in not reversing the same, upon the ground that the instruction of said Superior

Court to the jury upon the trial in said Superior Court, whereby said jury was instructed that its verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence in that the evidence without any material or substantial conflict showed an absolute right and title thereto in said Jacob Gardner, under said treaty and the Constitution and laws of the United States.

XI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the findings of said Superior Court, and the verdict of the jury therein, upon which said judgment was based, were under the Constitution, treaties and laws of the United States, wholly unsupported and unsustained by the evidence, and were contrary to the same adduced upon the trial in said Superior Court, it appearing in the record on appeal before said Supreme Court, without any material or substantial conflict that said Jacob Gardner held absolute right and title thereto, under the provisions of said treaty and the laws of the United States relating thereto.

XII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the evidence before said Superior Court appearing in the record on appeal before said Supreme Court, did show without any material or substantial conflict, that the lands in controversy, lay east of the western boundary of the Rancho Corte Madera del Presidio, and were included therein, accordingly as the same were possessed by Juan Reed from November, 1835, and by him down to the time of his death, by his heirs after his death, and by their successors in interest, down to and including the said defendant therein, Jacob Gardner, secured by said treaty and the Constitution and laws of the United States.

XIII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence before said Superior Court, without any material or substantial conflict, that the premises in controversy were included within the boundaries of the Rancho

Corte Madera del Presidio, accordingly as the same were secured by said treaty and confirmed to the heirs of Juan Reed by the final decree of the United States District Court of the Northern District of California, of January 14, 1856, and because that the title and interest of the said heirs of the said Reed to the premises in controversy, had become vested in said defendant, Jacob Gardner, through mesne conveyances from their successors in interest.

XIV.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that it appeared in the evidence before said Superior Court that under the laws of the United States, under which the said plaintiff, Ebenezer Wormouth, claimed title to said premises, he had acquired no title to ownership in or right of possession to the premises in controversy, or any part thereof, and that he was not entitled to maintain the action in said Superior Court, as against the defendant, Jacob Gardner, or any other person, in that his original homestead entry and all proceedings based thereon, were void, under the laws and Constitution of the United States.

XV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, and in not ordering the same dismissed or abated upon the ground that in the record on appeal from said Superior Court before said Supreme Court, it was shown conclusively said Superior Court was without jurisdiction to adjudicate any of the issues involved in said cause of action, in that the jurisdiction to determine said controversy lay wholly within the Courts of the United States, under the said Act of Congress of March 3, 1851.

XVI.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the whole controversy in said Superior Court turned upon the location of the boundaries of the Rancho Corte Madera del Presidio, which, under the Constitution and laws of the United States, and being based upon a right under a treaty of the United States, and under its Constitution and laws, could only be determined by the Courts of the United States, which had exclusive jurisdiction to determine the same.

XVII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that said Superior Court was without jurisdiction to determine the subject matter of the controversy involved in said cause of action before it, the same being vested exclusively in the United States District Court for the Northern District of California, by said act of March 3, 1851.

XVIII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the controversy before the Superior Court involved the right, title, ownership and possession of the premises there in controversy, which right, title, ownership and possession being dependent wholly upon a treaty of the United States, to wit: The Treaty of Guadalupe Hidalgo was by the Constitution and laws of the United States, and particularly by the Act of Congress of March 3, 1851, hereinbefore referred to, exclusively cognizable and determinable in the District Court of the United States of the Northern District of California, and the Supreme Court of the United States, and in that the question of the right, title, ownership and possession there involved, had been finally adjudicated and settled in said District Court by a final decree of said District Court, confirming the right and title of the heirs of Juan Reed to the land in controversy (together with other lands), and the right and title thereto being a right and a title under said treaty, was drawn in issue in Superior Court, which Superior Court found erroneously adversely thereto, and basing its judgment upon such finding, erroneously rendered judgment against the said defendant therein, Jacob Gardner, and which judgment was affirmed by said Supreme Court, notwithstanding that said right and said title under said treaty was there fully presented and argued, and the decision of said Supreme Court of the State of California was thereby against said right and said title, under said treaty claimed by the said defendant, Jacob Gardner, as the successor in interest of the said heirs of Juan Reed, the confirmees under said decree of said District Court, and thereby denied the said defendant, Jacob Gardner's right and title under said treaty to said premises.

XIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing

the same upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed title to the premises in controversy, under the treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who became then possessed thereof, and was possessed thereof from that time until his death in 1843, at which time his title and possession of said premises descended and became vested in and were possessed by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who as his heirs, and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California in a decree which became final and filed in said District Court January 14, 1856; the title of said heirs of said Juan Reed thereto, through mesne conveyances upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid title claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said title claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and because the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the

same; and because, by reason of said decision of said Supreme Court of the State of California affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his title to said premises duly claimed by him and duly vested in him by reason of said Treaty of Guadalupe Hidalgo and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the following ground: That in said Superior Court and in said Supreme Court, the said defendant, Jacob Gardner, claimed right and title to the premises in controversy, under the Treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who became then possessed thereof, and was possessed thereof from that time until his death in 1843, at which time his right and possession of said premises descended and became vested in, and were possessed by his children, John J. Reed, Hilarita M. Reed, and Inez Reed Deffebach, who, as his heirs, and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California, and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid, were entitled to retain the property they then possessed which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California, in a decree which became final, and filed in said District Court, January 14, 1856; the right of said heirs of said Juan Reed thereto, through mesne conveyances, upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises, continuing ever since that time, and said premises having been in the actual, adverse, and lawful possession of the successors in interest

of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid right claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision, and judgment of said Superior Court thereon, was against said right claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and before the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same. And because, by reason of said decision of said Supreme Court of the State of California, affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his right to said premises duly claimed by him and duly vested in him, by reason of said Treaty of Guadalupe Hidalgo, and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said title of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same, was against said right of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXIII.

That said Supreme Court of the State of California erred in not reversing said judgment of said Superior Court, upon the ground

that said judgment of said Superior Court was beyond its jurisdiction in that it in effect reviewed and set aside the said decree of said United States District Court of January 14, 1856, so far as the same confirmed the right and the title of said Jacob Gardner and his predecessors to said premises.

XXIV.

That said Supreme Court of the State of California erred in not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was against the right and title of said Jacob Gardner to said premises as secured to his predecessors by said Treaty of Guadalupe Hidalgo.

XXV.

The said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, and in not reversing the same, upon the ground that the title, ownership, and possession of the premises there in controversy, and the question of title thereto, had been finally adjudicated in the District Court of the United States, for the Northern District of California, in its aforesaid decree of January 14, 1856, and upon the further ground of said Superior Court was without power, authority, or jurisdiction to change, alter, or review the lawful effect of said decree, and was without jurisdiction to settle any right of the parties thereto, or their successors in interest, including said defendant, Jacob Gardner, finally determined or settled or adjudicated thereby.

XXVI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, on the ground that the title and the right was one insured and guaranteed to the said heirs of said Juan Reed, and to their successors in interest, including said defendant, Jacob Gardner, under said Act of Congress of March 3, 1851, to the premises in controversy.

XXVII.

The said Superior Court of the State of California erred in affirming said judgment of said Superior Court, upon the ground that the said Superior Court, by its said judgment, had in excess of its authority and jurisdiction, decided against and held invalid the right and title of the Reed heirs to the premises in controversy,

under the Treaty of Guadalupe Hidalgo, and which was confirmed to them and finally adjudicated valid by the United States District Court, by its said final decree of January 14, 1856, and to which right and title said Jacob Gardner had succeeded, as shown by certain mesne conveyances from said Reed heirs and their successors in interest, mentioned in the pleadings, and proved by the evidence at said trial, without any conflict whatever.

XXVIII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the sole question of right and title to the premises in controversy, before said Superior Court, was upon the validity of the right and title to said premises claimed by said Jacob Gardner, whose claim was that, as the successor in interest of said Reed heirs, the Mexicans who owned and possessed said premises at the time said treaty was executed and went into effect, his right and title to said premises which was secured to said Reed heirs by said treaty, and of the Constitution and laws of the United States relating thereto, and which had been confirmed to them by said United States District Court of the Northern District of California by its said decree of January 14, 1856, and that his ownership of said premises was the same ownership as their ownership and as their lawful successor in interest thereto, and that their possession beginning with that of their ancestor, Juan Reed, in November, 1835, had continued uninterruptedly through them and their several successors in interest down to and including the said Jacob Gardner, at the time of the commencement of said action, and ever since, and that his said right and title to said premises was the only issue before said Superior Court, upon which it based the following findings, to wit:—

1st. That on the 1st day of February, A.D., 1891, the plaintiff, Ebenezer Wormouth, was and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit:—

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181";

thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains more or less to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning being lot 3 of Section 28, and lot 3 of Section 29, township No. 1, north of Range No. 6 west M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining." And that the judgment of said Superior Court, being based upon that finding and decision against said title and right claimed under said treaty by the said Gardner, was contrary to the provisions of the Constitution, treaties and laws of the United States, relating thereto, and operated to destroy, set aside and annul a valid and vested right and title belonging to the said Gardner under the provisions of said treaty, and the Constitution and laws of the United States.

XXIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that there was no evidence before said Superior Court, upon which there was raised any material or substantial issue of fact, upon any point or question involved in said claim of right and title of said Jacob Gardner, under said treaty, and there was nothing to sustain said finding set out in the preceding assignment of error number XXVIII, and that said finding of said Superior Court, was found by said Superior Court solely because it appeared that the said Land Department had issued a patent to said Reed heirs after they had parted with their title and possession to the premises in controversy to certain of their successors in estate, who were the predecessors in estate of the said Jacob Gardner, and which patent fixed the boundaries of said Rancho Corte Madera del Presidio, upon different lines from those established by said decree of said United States District Court, of January 14, 1856, in this, to wit: the said decree of said United States District Court adjudged said boundaries to be the same as laid down in the original grant of said rancho to said Juan Reed in 1835, and which grant of possession fixed the western boundary of said rancho, upon a line that ran west of the premises in controversy, and which began as therein specified at the "solar" or house lot of the said Juan Reed, and thence ran north to the waters of the Arroyo Holon, and that the northern boundary of said rancho, beginning where said western boundary ended at a forest of sustain, or that even tended to show that the western boundary line

redwoods in said Arroyo Holon, continued eastwardly along the waters of said Arroyo Holon, and that said western and northern boundaries as laid down and fixed in said grant of possession to said Juan Reed, which was confirmed by and which became a part of said decree of said District Court, included the premises in controversy, within the boundaries of said rancho, and the said rancho, according to said boundaries, and after his death, as aforesaid, his said heirs went into possession thereof, and continued in actual possession thereof until they conveyed the same to the predecessors of said Jacob Gardner, as alleged in the cross-complaint of Jacob Gardner in said Superior Court.

That according to said grant of possession to said Juan Reed, confirmed by said District Court, as aforesaid, the said Western boundary beginning at said "solar" as aforesaid, went thence west of north accordingly as exemplified therein, and particularly in the map attached to said grant of possession.

That said patent issued by said Land Department to said Reed heirs, was issued upon the 25th day of February, 1885, and the boundaries of said grant, according to said patent, did not commence at said "solar" or house lot, but on the contrary, commenced at another point about three-quarters of a mile therefrom, and which point was pretended to be said "solar" and they ran said boundary from said pretended "solar," thence south to the Arroyo Corte Madera del Presidio, upon an entirely different line from that fixed and specified by said decree of said District Court, to wit: said boundaries as laid down in said grant of possession to said Juan Reed; that the western boundary of said Rancho, according to said patent, ended at said pretended "solar," and ran east of the premises in controversy, and wholly excluded from the northern boundary of said Rancho the waters of said Arroyo Holon; that said western boundary, according to said patent, beginning at its southermost point, ran east of north, as against that of said grant of possession, which ran west of north; that said patent was based upon a map compiled in said Land Office, and which map was not made lawfully upon a survey under the laws of the United States; that in the evidence in said Superior Court, it was proved, without any material or substantial conflict, that said "solar" was located, where said defendant, Jacob Gardner, claimed the same was located, and where the decree of said District Court located it, and said evidence also proved, without any conflict whatever, that the western boundary of said Rancho lay west of the premises in controversy and not east of them; that there was no evidence in said record to in any wise

contained in said patent conformed in any respect to said decree of said District Court, but on the contrary said evidence, without any material and substantial conflict whatever, showed that, said western boundary lay west of said premises, and not east thereof, and that the line as delineated and laid down in said patent, in no wise followed the decree of said District Court, but on the contrary said patent specified that the boundaries of said grant commencing at the "solar" went south to the Arroyo Corte Madera del Presidio, wholly contrary to said decree, and in violation of its express mandate, but was made solely by said Land Department, and was made without authority of law.

That the whole basis upon which said finding of said Superior Court was based was the mere fact that said Land Department, in compiling its map and survey, and in issuing its patent, had thereby excluded the premises in controversy from said rancho, contrary to said decree of said United States District Court, and notwithstanding that no court of competent jurisdiction had ever decreed otherwise than said District Court, and that the said Jacob Gardner and his predecessors in estate had held actual, continuous and adverse and lawful possession of said premises from the time the same was originally granted to said Juan Reed in November, 1835, as aforesaid, down to the time of the commencement of said action in said Superior Court, and ever since, and notwithstanding that the right and title of the said Jacob Gardner to said premises was a right claimed and held under said Treaty of Guadalupe Hidalgo, under said decree of said District Court, and under the Constitution and laws of the United States, and which had been finally settled and adjudicated.

XXX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the action was prematurely commenced in said Superior Court by said Wormouth, as plaintiff, and in that at the time of the commencement of the same, the said Wormouth's application therefor was pending in the Land Department, the patent had not been issued, and if the United States had title to the premises, it had not parted with the same, and said Wormouth claiming none other than the United States title, had none whatever, and could not therefore maintain said action; as under the laws of the United States, the title does not pass or vest in a homestead claimant until the United States patent, conveying the title of the Government issues, except in the case of mere naked trespassers who neither have nor make bona fide claim of title.

XXXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the sole question of title decided by said Superior Court, was one wherein the original primary sovereign title of the United States was at issue, i. e., the question as to whether or not the lands in controversy were ever included with the public land of the United States, or not; whether they were under the Treaty of Guadalupe Hidalgo, public lands of the United States, or the lands of private owners who possessed them at the time of, and prior to the execution of said treaty under the laws of the Republic of Mexico; and that the settlement of that question was one which, under the Constitution and laws of the United States, particularly under the Act of Congress of March 3, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California" was vested solely in the Courts of the United States, to wit: The District Court of the Northern District of California, and on appeal therefrom, the Supreme Court of the United States, and because said Superior Court was without jurisdiction to make any determination with reference to the settlement of that question.

XXXII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the question of right and title decided by said Superior Court, was one which had been finally settled and determined by said decree of said United States District Court, and which said Superior Court was without power, authority, or jurisdiction to in any wise determine.

XXXIII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the following grounds, to wit:

(*a*) That the evidence was insufficient to justify the second finding of the Superior Court upon the equitable issues in the case to the effect that one of the questions decided by the United States Register and Receiver, and affirmed by the United States Commissioner of the General Land Office and by the United States Secretary of the Interior, in the contest of *Throckmorton* v. *Wormouth*, mentioned in the 20th paragraph of the cross-complaint in said cause, was a question of fact, namely, the location of the western

boundary of the grant made by Governor Figueroa to Juan Reed, and that there was no evidence to support said finding;

(*b*) That the evidence was insufficient to justify the third finding of the Superior Court, upon the equitable issues before it, that the officers of the United States Land Department, to wit: The Register and Receiver, Commissioner of the General Land Office, and the Secretary of the Interior, did decide and find as a fact, upon the evidence produced before said Register and Receiver on said contest, was not included in said original grant by the Mexican Government to Juan Reed, and that there was no evidence to support said finding;

(*c*) That the evidence was insufficient to justify that portion of the fifth finding of the Superior Court, upon the equitable issues before it, in which it is found that the consideration paid by J. Clinton Bolton to the Reed heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, for the deed to him in 1865, when not a money consideration and that the only consideration which passed from said Bolton to said grantors, was the agreement by said Bolton mentioned in said fifth finding, and there is no evidence to support said finding;

(*d*) The evidence was insufficient to justify the sixth finding of the Superior Court, upon the equitable issues before it, to the effect that the officers of the United States Land Department, to wit: The United States Register and Receiver, the Commissioner of the General Land Office, and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of *Throckmorton* v. *Wormouth*, in denying said application of Throckmorton, did not base their decision upon the question of law alone, but did find and decide, as a fact, that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, but on the contrary, the evidence showed that said officers of the United States Land Department based their decision in said contest, upon the question of law alone and did not find and decide that the said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, and that there was no evidence to support said finding.

(*e*) The evidence was insufficient to justify, and there was no other evidence to support that portion of the 7th finding of the Superior Court, upon the equitable issues before it, wherein it found that the Rancho granted by the Government of California under the Government of Mexico, to Juan Reed, did not include

within its exterior limits the lands described in the deed from T. B. Deffebach et al. to Julius C. McCeney, of February 14, 1871, or any part thereof except so much as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al., and the evidence is insufficient to justify, and there is no evidence to support that portion of said 7th finding, wherein it is found that the grant mentioned in the first paragraph of said cross-complaint, did not include any part of the land in controversy in this action, and that no grant was ever made by the Mexican Government, to Juan Reed or his successors in interest, included in any part of the land described and granted to the plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

(*f*) The evidence was insufficient to justify, and there was no evidence to support the eighth finding of the Superior Court, upon the equitable issues before it, to the effect that the land described in said deed from T. B. Deffebach et al. to Julius C. McCeney, or any part thereof, except as in the seventh finding of the Court set forth, was not within the exterior boundaries of said Mexican grant.

(*g*) That the evidence was insufficient to justify, and there was no evidence to support that portion of the ninth finding of the Superior Court to the effect that the consideration mentioned in the ninth finding of the Superior Court upon the equitable issues before it, to the effect that the consideration mentioned in the fifth finding upon said equitable issues, was the only consideration for the deed mentioned in said ninth finding.

(*h*) That the evidence was insufficient to justify, and there was no evidence to support that portion of the tenth finding of the Superior Court in the equitable issues before it, in which it found that neither T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle or H. C. Newhall did, on the first day of February, 1871, or at any other time, own or were entitled to convey to any one any of the land described in the sixteenth paragraph of said cross-complaint, except a small part thereof, which was described in said tenth finding.

(*i*) That the evidence was insufficient to justify, and there was no evidence to support that portion of the 11th finding of the Superior Court, upon the equitable issues before it, which is to the effect that Julius C. McCeney on the 19th day of January, 1875, or at any other time, was the owner, and was not entitled to convey any of the land mentioned and described in the deed from said McCeney to said Throckmorton, described in said 11th finding, save

and except that portion of said land which lies within the boundary of said Reed patent.

(*j*) The evidence was insufficient to justify, and there was no evidence to support that portion of the 12th finding of the Superior Court, upon the equitable issues before it, which is to the effect that none of the grantees named in the deed mentioned or referred to in the 18th paragraph of said cross-complaint purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and rights of the plaintiff, as alleged in his complaint in this action, and that neither the said Throckmorton or his executrix ever had any right to use or improve any part of said lot 3 in section 28, or of said lots 2 and 3 in section 29, and that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff; and the evidence is insufficient to justify, and there is no evidence to support that portion of said 12th finding which is to the effect that said grantees and each of them, and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by the said deeds, or any part or parcel of said lot 3 in section 28 and said lots 2 and 3 in said section 29, were included within said Mexican grant, and that said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lots 2 and 3 in section 29.

(*k*) The evidence was insufficient to justify, and there was no evidence to support that portion of the 13th finding of the Superior Court, upon the equitable issues before it, which is to the effect that there is no evidence to show that the evidence introduced in the matter of the application and contest mentioned in the 19th paragraph of said cross-complaint did not show without conflict that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true, but, on the contrary, the evidence did show that all of said facts mentioned were true.

And the evidence is insufficient to show and there is no evidence to show that the evidence introduced in the matter of said application and contest did not establish all of said facts or any material fact in favor of said Throckmorton's right to purchase said land by competent, or any, evidence, and that there was conflict in said evidence, and that there was evidence on said contest that contradicted said Throckmorton's evidence, and that the evidence alleged

in said cross-complaint was not true, but, on the contrary, said evidence did establish all of said facts in favor of Throckmorton's right by competent evidence and without conflict, and there was, in fact, no evidence of said contest which contradicted Throckmorton's evidence, and it fully appeared from the evidence that all the evidence, as alleged in said cross-complaint on said contest, was true;

And the evidence is insufficient to show, and there is no evidence to show that the Register and Receiver of the Land Office at San Francisco did not, nor did either of them, on the 9th day of February, 1866, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict, but, on the contrary, the evidence fully shows that said Register and Receiver did, on the said 9th day of February, 1886, base their and his decision fully and precisely upon the evidence as the same is alleged in said cross-complaint and upon evidence without conflict;

And the evidence is insufficient to show and there is no evidence to show that the Register and Receiver did not, nor did either of them, rest their or his decision upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law, or under the law, entitled to purchase the said land, and that the Commissioner of the General Land Office, on appeal from the decision of the Register and Receiver, upon the, or upon a proposition of law in deciding that Throckmorton was not entitled to purchase the said land, and that the said Secretary of the Interior did not rest his decision affirming the decision of the Commissioner of the General Land Office upon the, or upon a proposition of law, and that the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of *Throckmorton* v. *Wormouth*, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint, but, on the contrary, the evidence showed that each of the said officers of the Land Department, to wit: the Register and Receiver, the Commissioner, and the Secretary of the Interior, based his decision and each of said respective decisions upon the proposition of law, to wit: the proposition that upon all the facts set forth in said cross-complaint, which were duly established before said officers, and each of them, the said Throckmorton was not in law, or under the law, entitled to purchase the said land.

(*l*) The evidence was insufficient to justify, and there was no evidence to support that portion of the 14th finding of the Superior

Court, upon the equitable issues before it, which is to the effect that the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns, and was not entitled to purchase the said land or any part thereof under said act of Congress, and that the Register and Receiver of said Land Office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow plaintiff to make proof and payment for the said land, but on the contrary, the fact was and the proofs before said officers showed without conflict that said Throckmorton was a bona fide purchaser from Mexican grantees and their assigns, and was entitled to purchase the said land and every part thereof under said act, and the Register and Receiver of said Land Office did, contrary to law, basing their decision on an erroneous construction of the law applicable to the case before them, allow the plaintiff to make proof and payment for said land, and hold in substance that all of the facts set forth in the cross-complaint herein did not entitle said S. R. Throckmorton to purchase said land.

(*m*) The evidence is insufficient to justify, and there was no evidence to support that portion of the 15th finding of the Superior Court upon the equitable issues before it, which is to the effect that said Susanna M. Throckmorton was not the owner of the said land when she executed the said deed, and that she was not entitled to convey the same to said Gardner.

(*n*) The evidence was insufficient to justify, and there was no evidence to support that portion of the 16th finding of the Superior Court, upon the equitable issues before it, which is to the effect that Jacob Gardner did not, on the 17th day of July, 1890, or at any other time, enter into the possession thereof, except as an intruder and tresspasser.

(*o*) The evidence was insufficient to justify, and there was no evidence to support the 17th finding of the Superior Court, upon the equitable issues before it, to the effect that said Jacob Gardner is not, and never was, the owner in equity of said land or any part of the land described in the plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22d paragraph of said cross-complaint, and that said plaintiff does not hold said land, or any part thereof, in trust, or otherwise or at all, for defendant, Jacob Gardner.

XXXIV.

The said Supreme Court of the State of California erred in that

part of its decision contained in his opinion filed in said cause upon appeal, in the following particulars:—

(*a*) In deciding that "the principal contention of the defendants for reversal was in relation to what they called their equitable title."

(*b*) In deciding that the contest of Throckmorton referred to in said opinion, was one entirely within the jurisdiction of the United States Land Department, in that the record on appeal before said Supreme Court showed without conflict that the contest was not within the jurisdiction of said Land Department, in that it involved a judicial question as to the character of the land in controversy, whether, under the treaty of Guadalupe Hidalgo, it became public land of the United States, or remained the private holding of private owners.

(*c*) In deciding that both parties in said contest in said Land Department were endeavoring to get title in which each admitted the land was United States Government land, and was subject to disposition under the laws of the United States, it appearing in said record on appeal without conflict that said proceeding on the part of Throckmorton was not to obtain title to what he admitted to be United States Government land, but was for the sole purpose of obtaining a quit-claim of the Government's interest in said land, and thereby removing a cloud upon his title.

(*d*) In deciding that the Land Department had exclusive jurisdiction to determine all the facts which arose in said contest.

(*e*) In deciding that the decision of the Land Department in said contest was a decision upon the issues of fact specified in said opinion, in that the transcript of the proceedings in said Land Department in evidence in said Superior Court, and contained in said record upon appeal, did show conclusively that all the evidence before said Land Department was without any conflict as to any material fact; that there were no issues of fact before the Land Department, and that the only decision of the Land Department was upon the legal effect of the undisputed facts in the record before it.

(*f*) In deciding that "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the possession of the same, according to the lines of his purchase were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as belief

that the land he purchassed was included within the original limits of the Mexican grant, were also facts to be determined by that officer, from all the circumstances under which the purchsse was made." That the decision in these particulars is erroneous and contrary to the Constitution and laws of the United States, in that the evidence before said Land Department aforesaid, without any material or substantial conflict whatever, did show that at the time Throckmorton made said application to said Land Department, his right and title to said premises was one that was valid and well vested, and secured to him under said Treaty of Guadalupe Hidalgo, and which had been finally settled and adjudicated in favor of the right and title he claimed by said District Court in its said decree of January 14, 1856, and that by reason of the fact that Throckmorton, at the time of said application, had absolute title to said premises, and as a matter of law, under the Constitution and laws of the United States, the question as to whether he purchased the land for a valuable consideration, or that, that after his purchase, he used, improved and continued in the actual possession of the same, or that that of his good faith in making the purchase, or that that of his belief that the land he purchased was included within the original limits of the Mexican grant, could not be raised in said Interior Department, said Interior Department being concluded, as a matter of law, upon all those facts, and that therefore, there being no issues of fact before said Land Department, the Secretary of the Interior could not render a decision upon any of those facts, but could only render a decision upon the law in the case, and that its decision was therefore but a decision upon the law in the case.

(*g*) In deciding that the decision of the Secretary of the Interior was not an erroneous application of the law, and in deciding that its decision was based upon facts which necessarily defeated the claim of Throckmorton.

(*h*) In deciding that the decision of the United States Land Department, accordingly as the same in said record and appeal was conclusive in favor of respondent Wormouth's title.

(*i*) In deciding that the other points in the case were unnecessary to be discussed.

XXXV.

The Supreme Court of the State of California erred in deciding that the decision of the Land Department was conclusive as to Wormouth's title to the premises in controversy, upon the ground that it amounts to the said appellant, Jacob Gardner, being thereby

deprived of his property by the State of California, without due process of law, in deciding that the Land Department, by its decision in said contest before it, between said Throckmorton and said Wormouth, that the decision of said Department adverse to said Throckmorton, operated to destroy his right and title to said premises under said treaty.

In order that the foregoing assignment of errors may be and appear of record, the respondents present the same to the Court, and pray for such disposition be made thereof as in accordance with the law and statutes of the United States in such cases made and provided.

Wherefore, the said Jacob Gardner and Peter Gardner, as plaintiffs in error, pray that judgment of said Supreme Court of the State of California, be reversed, and that the judgment of said Superior Court of said State of California, in and for said County of Marin, be likewise reversed, and that said Superior Court be directed to grant a new trial of said case.

(Signed) GEO. W. MONTEITH,
Attorney for Appellants in said Supreme Court
as Plaintiffs in Error.

ARGUMENT.

That no Federal question is involved in this action, must, we think, be clearly apparent.

It was conceded on both sides that the treaty of Guadalupe Hidalgo (9 Stat. 922), preserved whatever rights the heirs of Juan Reed had. That under the authority of the Act of March 30, 1851 (9 Stat. 631), those heirs by the steps they took before the Board of Land Commissioners in 1854 and by the affirmance of the decision of the Board of the U. S. District Court, acquired a perfect title to all the land within the boundaries of the Rancho Corte de Madera del Presidio.

Thus nowhere is the validity of any treaty of, statute of, or authority exercised under the statute of the United States drawn in question. Nowhere is any statute of or authority exercised under any State drawn in question. No title, right, privilege, or immunity is claimed under the Constitution, nor is any commission held or authority exercised under the United States drawn in question.

One question only was involved: Was or was not the land in dispute within the boundaries of the Corte de Madera del Presidio Rancho? Plaintiffs in error have claimed that it was. Defendant in error insists that twice the official survey of the United States has excluded it from the Rancho—that the Land Department found that it never was a part of the Rancho—that the State courts found that it never was a part of it.

The only question at any time has been, where was the initial point of the original grant, and in what direction did the western boundary run?

These matters have been decided by competent tribunals and this Court has no jurisdiction to entertain this case.

1. The decision of the Land Office was final upon the legal branch of this case.

2. The judgment of the Superior Court affirmed by the Supreme Court, was final upon the equity branch.

3. The official survey of Allardt and Ransome in 1873 and 1874, referred to in paragraph 6 of the cross-complaint, excluded the land from the Rancho, and is not open to collateral attack.

Upon the first proposition, that the decision of the Land Office affirmed by the Secretary of the Interior was final upon the rights of Throckmorton and settled the character of the land in question, we respectfully call attention to the following authorities:—

Aurora Hill Con. Mng. Co. v. 85 *Mng. Co.*, 34 Fed. 515;
Germania Ins. Co. v. *U. S.*, 19 U. S. App. 10;
Craig v. *Leitensdorfer*, 123 U. S. 213;
Bishop of Nesqually v. *Gibbon*, 158 U. S. 166;
Gonzales v. *French*, 164 U. S. 342.

Confronted by this dilemma, plaintiffs in error sought to invoke the aid of equity in attacking the patent issued to defendant in error upon the ground that it had been issued under an erroneous construction of the law. The cross-complaint was demurred to; the sufficiency of it as against demurrer was upheld in appeal to the Supreme Court of the State (*Wormouth* v. *Gardner*, 112 Cal. 506), the Court saying that plaintiff in error was entitled to relief if the facts supported the allegations. Thus again, upon the equity branch of the case, questions of fact were submitted to the Superior Court for its determination. The findings of fact of the Court, the judgment of the Supreme Court upon appeal from the order deny-

ing a new trial, upon the ground of the insufficiency of the evidence to justify the decision (findings of fact and conclusions of law) were final upon the equity branch of the case.

Egan v. *Hart*, 165 U. S. 188.

There being no question involved but a question of boundary, the United States Supreme Court will not assume jurisdiction.

Almonester v. *Kenton*, 9 How. (U. S.) 1;
Moreland v. *Page*, 20 How. (U. S.) 522;
Lanfear v. *Henley*, 6 Wall. 204.

That an official survey approved cannot be collaterally attacked; see

Russell v. *Maxwell Land Grant Co.*, 158 U. S. 253.

Blocked by the foregoing propositions of law, plaintiffs in error assail the jurisdiction of the Superior Court.

No effort was made to remove the case.

Capital Bank v. *Cadiz*, 172 U. S. 433.

And any such effort would have been unsuccessful under either the act of 1875 (18 Stat. 470) of 1887 (24 Stat. 552) or of 1888 (25 Stat. 533).

In framing this brief, we have relied upon nothing that was not introduced in evidence, and the entire record will add nothing to the position of plaintiffs in error — the only parts omitted are matters of evidence which this Court cannot consider, and we respectfully submit that the motion to dismiss the writ of error should be sustained.

ALFRED L. BLACK,
Attorney for Defendant in Error.

C. K. BONESTELL,
Of Counsel.

17073

No. 148.

Brf. of Bonestell

Office Supreme Court U.S.
FILED
JAN 16 1901
JAMES H. MCKENNEY,
Clerk.

Filed Jan. 16, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1900.

No. 148.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

vs.

L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR

C. K. BONESTELL,
ATTORNEY FOR DEFENDANT IN ERROR.

(17,533.)

FILED DECEMBER 1900.

17074

In the Supreme Court of the United States.

JACOB GARDNER and PETER GARDNER,
Plaintiffs in Error,

vs.

C. K. BONESTELL, Executor, &c.,
Defendant in Error.

Brief of Defendant in Error.

The question involved in this action is one of boundary alone and this Court has no jurisdiction.

Almonester *vs.* Kenton, 9th How., U. S., 1.
Lanyear *vs.* Henley, 4 Wall., U. S., 204.
Dower *vs.* Richards, 151 U. S., 658.

Three questions were involved in the contest before the Land Department, all questions of fact: (*a*) Was the land in controversy ever within the grant to Read; (*b*) Was Throckmorton a purchaser in good faith and for valuable consideration within the meaning of the act of July, 1866 (14 Stat., p.218); (*c*) Had Wormouth complied with the law so as to be entitled to his patent. All of

these were disputed questions of fact and their determination by the Land Department was conclusive.

Moreland *vs.* Page, 20 Howard, U. S., 522.
Aurora Hill Mining Co., *vs.* Sts. Mining Co., 34 Fed. Rep., 575.
Pelluride Mining Co. *vs.* Rio Grande Ry. Co., 175 U. S., 639.
Craig *vs.* Leitersdorfer, 123 U. S., 189.

A Court of equity can only interfere when it is clear that the officers of the Land Department have by a mistake of law, given to one man the land which on undisputed facts belongs to another. And where there is a question of fact, or a mixed question of law and fact, and the Court cannot so separate it as to see clearly where the mistake is, the decision of the tribunal to which the law has confided the matter is conclusive.

Marquez *vs.* Frisbie, 101 U. S., 473.
Vance *vs.* Burbank, 101 U. S., 514.

Where a survey conforms to the decree confirming the grant as nearly as practicable, the survey will not be disturbed even on direct attack.

Dehon *vs.* Bernal, 3 Wall., U. S., 774.
U. S. *vs.* Armijo, 5 Wall., U. S., 444.

The subject of surveys of confirmed land claims, is under the control of the Land Department, and its action is not subject to supervision of the Court, however erroneous.

U. S. *vs.* Flint, 4 Sawyer, 42.

It is respectfully submitted that the writ should be dismissed and the judgment of the State Court affirmed.

C. K. Bonestell,
Attorney for Defendant in Error.

17075

Supreme Court of the United States.

No. 143.—October Term, 1900.

Jacob Gardner and Peter Gardner, Plaintiffs in Error,
vs.
L. H. Bonestell, Executor of the Estate of Ebenezer Wormouth, Deceased, Defendant in Error.

On writ of error to the Supreme Court of the State of California.

[February 25, 1901.]

In 1834 Juan Reed applied to and received from the Mexican governor of California a grant of a tract of land. In 1854 his heirs petitioned the commission created by the United States for a confirmation of that grant. It was confirmed, the order therefor being in these words:

"In this case on hearing the proofs and allegations, it is adjudged by the commission that the said claim of the petitioners is valid, and is therefore hereby decreed that the same be confirmed.

"The land of which confirmation is hereby made is the same on which said Juan Reed resided in his lifetime; is known by the name of Corte de Madera del Presidio, is situated in Marin County and bounded as follows, to wit: Commencing from the solar which faces west at a point at the slope and foot of the hills which lie in that direction and on the edge of the forest of redwoods called Corte de Madera del Presidio, and running from thence in a northwardly direction four thousand five hundred varas to an arroyo called Holon where is another forest of redwoods called Corte de Madera de San Pablo; thence by the waters of said arroyo and the Bay of San Francisco ten thousand varas to the Point Taburon, said point serving as a mark and limit; thence running along the borders of said bay and continuing in a westerly direction along the shore of the bay formed by Point Caballos and Point Taburon, four thousand seven hundred varas to the north of the canada and the point of the 'sausal' which is near the Estero lying east of the house on said premises which was occupied by said Juan Reed in November, 1835; and thence continuing the measurement from east to west along the last line eight hundred varas to the place of beginning; containing one square league of land, be the same more or less; being the same land described in the testimonial of juridical possession on file in this case, as having been measured to said Juan Reed under a grant of the same to him, to which testimonial and the map therein referred to and constituting a part of the expediente, a traced copy of which is filed in the case, reference is to be had."

An appeal was taken therefrom to the District Court of the United States, and the following order of confirmation was made on January 14, 1856:

"This cause came on to be heard at a stated term of the court on appeal from the final decision of the board of commissioners to ascertain and settle the private land claims in the State of California under the act of Congress approved on the 3d of March, A. D. 1851, upon the transcript of the proceedings and decision of the board of commissioners, and the papers and evidence on which the said decision was founded, and it appearing to the court that the said transcript has been duly filed according to law, and counsel for the respective parties having been heard, it is by the court hereby ordered, adjudged and decreed that the said decision be, and the same is hereby, in all things affirmed, and it is likewise further ordered, adjudged and decreed that the claim of the appellees is a good and valid claim, and that the said claim be, and the same is hereby, confirmed to the extent and quantity of one square league, being the same land described in the grant and of which the possession was proved to have been long enjoyed. Provided, that the said quantity of one square league now confirmed to the claimants be contained within the boundaries called for in the said grant and the map to which the grant refers, and if there be less than that quantity within the said boundaries, then we confirm to the claimants that less quantity."

No appeal was taken from this order of confirmation, and it, therefore, became final. In 1858 a survey was ordered by the Land Department, and was made by a surveyor, named Mathewson, who surveyed one square league as being the full amount of the tract confirmed to the petitioners. The petitioners claimed that their grant was of a tract described by metes and bounds and not of a given quantity within exterior boundaries, and after some controversy between them and the Land Department the latter recognized their claim, set aside the Mathewson survey and ordered a new survey. This was made in 1871. It was confirmed by the Land Department, and has never been questioned therein. Thereupon a patent was issued to the petitioners, conveying the tract by metes and bounds as described in the order of the commission and shown by the last survey.

The tract in controversy is outside the limits of both surveys. Prior to the last survey Ebenezer Wormouth, the testator of defendant in error, settled upon the tract in controversy, and thereafter made application to enter the tract as public land of the United States. A contest was had between such testator and one Samuel R. Throckmorton, claiming title from the heirs of Reed, the original grantee, first in the local land office, thence carried by appeal to the General Land Office, and thereafter to the Secretary of the Interior. The right to enter was sustained and a patent issued. Thereafter this action against the plaintiffs in error holding under Throckmorton was instituted in the Superior Court of the County of Marin, California, which, at first a mere action in ejectment, became by the pleadings subsequently filed a suit in equity to try title. The decree in the trial court was in favor of Wormouth, which was affirmed by the Supreme Court of the State, (125 Cal. 316,) and thereafter this writ of error was sued out.

In the trial court the question of title was submitted to the court and findings of fact made. Among them were the following:

"2d. That one of the questions decided by the United States register and receiver, and confirmed by the United States Commissioner of the General Land Office, and by the United States Secretary of the Interior in the said contest of *Throckmorton* v. *Wormouth*, mentioned in the twentieth paragraph of said cross complaint herein, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed.

"3d. That the officers of the United States Land Department, to wit, the register and receiver, the Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact upon the evidence produced before said register and receiver on said contest, that the land in controversy in this action was not included in the said original grant by the Mexican government to Juan Reed."

"6th. That the officers of the United States Land Department, to wit, the United States register and receiver, the Commissioner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of *Throckmorton* v. *Wormouth*, in denying said application of Throckmorton, did not base their decision upon a question of law alone, but did find and decide as a fact that said Throcknorton was not a purchaser in good faith from Mexican grantees or their assigns.

"7th. This court further finds as follows: That the rancho granted by the governor of California, under the government of Mexico, to Juan Reed, did not include within its exterior limits the land described in the deed from T. B. Deffebach et al. to Julius C. McCeney of February 14, 1871, or any part thereof, except so much thereof as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al. That the grant mentioned in the first paragraph of said cross complaint did not include any part of the land in controversy in this action. That no grant ever made by the Mexican government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the twenty-second paragraph of said cross complaint.

"8th. That the land described in said deed of T. B. Deffebach et al. to Julius C. McCeney, or any part thereof, except as in the last finding above set forth, was not within the exterior boundaries of said Mexican grant."

"12th. That none of the grantees named in the deeds mentioned or referred to in the eighteenth paragraph of said cross complaint purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and right of the plaintiff, as alleged in his complaint in this action.

"That neither the said Throckmorton, nor his executrix, ever had any right to use or improve any part of said lot 3 in section 28, or of said lots 2 and 3 in section 29; that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff.

"13th. That the evidence introduced in the matter of the application and contest mentioned in the nineteenth paragraph of said cross complaint

did not show without conflict, or show at all, that all of the facts set forth in the preceding paragraphs of said cross complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true; that the evidence introduced in the matter of said application and contest did not establish all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; that there was conflict in said evidence; that there was evidence on said contest which contradicted Throckmorton's evidence; that the evidence as alleged in said cross complaint was not true.

"That the register and receiver of the land office at San Francisco did not, nor did either of them, on the 9th day of February, 1886, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross complaint, or upon evidence without conflict; that the said register and receiver did not, nor did either of them, rest their or his decision upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law or under the law entitled to purchase the said land.

"That the Commissioner of the General Land Office, on appeal from the decision of the register and receiver, did not base his decision upon evidence without conflict, and did not rest his decision upon the or upon a proposition of law, in deciding that Throckmorton was not entitled to purchase the said land.

"That the said Secretary of the Interior did not rest his decision, affirming the decision of the Commissioner of the General Land Office, upon the or upon a proposition of law.

"That the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of *Throckmorton* v. *Wormouth*, that said Throckmorton was not a *bona fide* purchaser from Mexican grantees or their assigns of the lands described in paragraph sixteen of said cross complaint.

"14th. That the said Throckmorton did, claiming to be a *bona fide* purchaser from Mexican grantees, make said application (to purchase) to the register and receiver of the United States land office at San Francisco, under section 7 of the act of Congress entitled, 'An act to quiet land titles in California.'

"That the said Throckmorton was not a *bona fide* purchaser from Mexican grantees or their assgns and was not entitled to purchase the said land or any part thereof under said act of Congress."

The opinion of the Supreme Court rested upon the single proposition that the Land Department had jurisdiction of the controversy, and that its judgment was founded upon disputed questions of fact, and, therefore, was not subject to review in the courts.

Mr. Justice Brewer delivered the opinion of the Court.

The plaintiffs in error base their right to the land in controversy upon this provision of the act of July 23, 1866, (14 Stat. 218, 220):

"That where persons in good faith and for a valuable consideration have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been

excluded from the final survey of any Mexican grant; and have used, improved and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same."

Every branch of the Land Department, from the register and receiver of the local land office up to the Secretary of the Interior, decided against the contention of Throckmorton, (under whom the plaintiffs in error claim,) holding that the land was not within the exterior boundaries of the grant, and that Throckmorton was not a purchaser in good faith from the grantee, or his assigns. The trial court, referring to the decision of the Land Department, found that it was not based upon any matter of law, but upon questions of fact in respect to which there was conflicting testimony. Further, that court upon the testimony adduced before it found in accord with the conclusions of the Land Department, and the Supreme Court of the State has sustained such finding.

Certain propositions may be stated which compel an affirmance of the judgment of the Supreme Court of the State. And first, "it is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding." (*Knight* v. *United States Land Association*, 142 U. S. 161, 176.)

The grant was one not of quantity but by metes and bounds, and the final survey, approved by the Land Department, determined conclusively the exterior boundaries of that grant. The land in controversy was not within those boundaries. Counsel for plaintiff in error assumes that the correctness of this survey may be litigated in an action between private parties. He insists that the last survey, which he says was a mere compilation and not an actual resurvey, included a large body of lands on the one side which were not, in fact, within the boundaries of the tract of which juridical possession had been given, and excluded on the other side a large body which were within such boundaries and which included the lands in controversy. If his contentions were sustained to the full extent the result would be to enlarge the boundaries of the grant on the one side without reducing them on the other, and so increase the area of the grant several hundred acres above its admittedly true size. In other words, the United States, which obtained by the treaty of cession full title to all lands not subject to private grant, would be deprived of these extra acres, undoubtedly their property. He has mistaken his remedy. It was by application to the Land Department to correct the survey, and failing to secure correction there, a direct proceeding in the courts in which the Reed heirs should have been parties, and in which they could have been heard to defend the survey and patent.

Again, the determination of the Land Department in a case within its jurisdiction of questions of fact depending upon conflicting testimony is conclusive, and cannot be challenged by subsequent proceedings in the courts. (*Burfenning* v. *Chicago, St. Paul &c. Railway*, 163 U. S. 321, 323, and cases cited in the opinion; *Johnson* v. *Drew*, 171 U. S. 93–99.)

The Land Department found and adjudged not only that the land in controversy was outside the exterior boundaries of the grant, but also that Throckmorton was not a purchaser in good faith. Both of these findings were matters of fact and based upon the testimony. No proposition of law controlled such findings, and no error of law is apparent. Both questions of fact were determined by the Land Department adversely to the plaintiffs in error, and that determination concludes the courts. Counsel insists that there was no conflicting testimony. He ignores the survey which is in itself evidence, and that of a most persuasive kind. There are many things which a surveyor sees and finds in making a survey which are not and cannot be reproduced on paper, and which yet guide him, and wisely guide him, in the lines he runs. So that even in a case in which a survey is a proper subject of attack it can be overthrown only upon satisfactory evidence of mistake. It cannot be ignored and the only matter considered be the tendency and significance of the oral testimony of witnesses as to lines, metes and bounds.

The trial court, in addition to its findings in reference to the proceedings in the Land Department, found, as independent matters of fact, that the land in controversy was outside the exterior boundaries of the grant, and that Throckmorton was not a *bona fide* purchaser. The Supreme Court of the State sustained those findings. Now, in proceedings in this court to review the action of State courts we do not enter into a consideration of questions of fact. We accept the determination of those courts in such matters as conclusive, and inquire simply whether there have been errors of law. (*Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Hedrick* v. *Atchison, Topeka &c. Railroad Co.*, 167 U. S. 673, 677.)

For these reasons the judgment of the Supreme Court of California is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.